No. 449.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1927.

FRANK C. JORDAN, Secretary of State, and ROBERT V. JORDAN, Deputy Secretary of State,

Petitioners,

vs.

K. TASHIRO, M.D., ISAMI SEKIYAMA, M.D., PAUL K. ITO, M.D., Y. KARAKI, and F. T. NAKAYA, M.D.,

Respondents.

PETITION FOR WRIT OF CERTIORARI

To Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States, and

To the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully present:

That the decision of the Supreme Court of the State of California in the case of *Tashiro et al.* vs. *Jordan et al.*, 73 Cal. Dec. 635, decided May 20, 1927,

(R. 10) should be reviewed by this court by reason of the following circumstances:

The respondents petitioned the Supreme Court of the State of California for a writ of mandate to compel your petitioners to file certain articles of incorporation and issue a certificate of incorporation. In their petition respondents alleged: that they are all citizens and subjects of the Empire of Japan, and as such are ineligible to citizenship in the United States; that they are residents of the State of California and physicians and surgeons licensed to practice as such in the State of California; that the corporation which they are attempting to form and of which they are the only incorporators is to be known as the "Japanese Hospital of Los Angeles," and by its articles of incorporation is to be permitted to lease land upon which to erect and maintain a hospital; and, lastly, that your petitioners refused to file such articles of incorporation and to issue a corporate charter to them. In such petition respondents contended that the Treaty of Commerce and Navigation between the Government of the United States and the Empire of Japan proclaimed April 5, 1911, gives to them the right as citizens and subjects of the Empire of Japan to incorporate in the United States and under the laws of the State of California the particular corporation which they are attempting to incorporate. (R. 1 to 8.)

Upon a hearing of the matter the Supreme Court of the State of California rendered its decision hold-

ing that pursuant to the treaty the respondents were entitled to the relief prayed for. (R. 10 to 19.)

Such decision holds that the treaty mentioned, and particularly Article I thereof, gives to respondents as citizens and subjects of the Empire of Japan the right to lease land in California upon which to operate and maintain a hospital, or, in other words, that a hospital is a "commercial purpose" within the intendment of that clause of Article I, which grants to citizens and subjects of the Empire of Japan the right "to lease land" in the United States "for residential and commercial purposes."

That decision further holds that incorporating and doing business through a corporation is incident to trade within the intendment of that clause of Article I of said treaty, which grants to the citizens and subjects of the Empire of Japan the right "to do anything incident to or necessary for trade upon the same terms as native citizens or subjects;" that the business of conducting a hospital for profit constitutes trade, and that as citizens and subjects of the United States are permitted by the laws of the State of California to form and operate through a corporation for the purpose of leasing land upon which to erect and maintain a hospital, the treaty clause mentioned gives respondents the right to form and operate through a corporation organized by them under the laws of California for the purpose of leasing land upon which to erect and maintain a hospital.

Through improvidence this matter was brought to this court on writ of error instead of on *certiorari*, and when called for hearing on April 13, 1928, the court pointed out such mistake and granted petitioners leave to prepare and present a proper petition within two weeks from said date. We therefore respectfully present this petition for a writ of *certiorari* to the Supreme Court of the United States.

The record of the proceedings had in the court below, both before and after judgment was rendered, and including a copy of that judgment, has been printed by the clerk of this court and is now on file. From that record it appears that the respondents to this petition petitioned the Supreme Court of the State of California for a writ of mandamus to compel your petitioners to file certain articles of incorporation and to issue a certificate of incorporation, specially setting up and claiming that they were entitled to the relief prayed for because of certain covenants contained in the Treaty of Commerce and Navigation between the government of the United States and the Empire of Japan proclaimed April 5, 1911. (R. 1–8.) It further appears from said record that the Supreme Court of the State of California rendered its decision in the matter on May 20, 1927, sustaining the federal claims specially set up in the petition for writ of mandamus, and ordered a peremptory writ of mandamus to issue. (R. 10–19.) It further appears from said record that

within the time provided by section 350 of title 28 of the U. S. C. (three months), to wit, upon the 20th day of June, 1927, your petitioners presented to the Chief Justice of the Supreme Court of the State of California a petition for writ of error, together with assignment of errors and a prayer for reversal, and that on the same day the said Chief Justice of the Supreme Court of the State of California made an order allowing such writ of error. (R. 20 and pp. 30-32.)

The jurisdiction of this court is invoked under that part of paragraph (b) of section 344, title 28, U. S. C., which confers jurisdiction on this court to review a final judgment or decision of the highest court of a state:

> "* * * where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the federal claim is sustained as where it is denied."

Such jurisdiction should have been invoked by *certiorari* and not by writ of error, but the facts heretofore recited show that this case falls under the saving provision of paragraph (c) of said section, namely:

> "(c). If a writ of error be improvidently sought and allowed under this section in a case

where the proper mode of invoking a review is by petition of *certiorari*, this alone shall not be a ground for dismissal; but the papers whereon the writ of error was allowed shall be regarded and acted on as a petition for *certiorari* and as if duly presented to the Supreme Court at the time they were presented to the court or judge by whom the writ of error was allowed * * *".

In conformity to subsection *a* of section 5 of Rule 35 of the rules of this court we call the court's attention to the fact that this court has never held that the business of conducting a hospital for profit, or of conducting any similar business, is a commercial purpose within the intendment of that clause of Article I of the treaty mentioned which confers upon the citizens and subjects of Japan the right to lease land for residential and commercial purposes, and that the decision of the Supreme Court of the State of California that such business is a commercial purpose is not in accord with the applicable decisions of this court upon the subject.

See:

Paul vs. *Virginia*, 8 Wall. U. S. 168, 183;
Kidd vs. *Pearson*, 128 U. S. 1, 20;
Crescent Cotton Oil Co. vs. *City of Mississippi*, 257 U. S. 129, 136;
Terrace vs. *Thompson*, 274 Fed. 841;
Terrace vs. *Thompson*, 263 U. S. 197; and
The Amiable Isabella, 6 Wheaton, U. S. 1, 71.

We also call the court's attention to the fact that this court has never passed upon the question

whether incorporating, or doing business through a corporation, is incident to or necessary for trade within the intendment of that clause of Article I of the treaty mentioned which confers upon the citizens and subjects of Japan the right "to do anything incident to or necessary for trade upon the same terms as native citizens or subjects;" nor has this court ever passed upon the question whether the treaty between the United States and Japan confers or purports to confer upon the citizens and subjects of the latter country the right to incorporate in any state of this Union under the laws of that state, and particularly to incorporate in the State of California under its laws especially in view of the provisions of its Alien Land Law; and that the holding of the Supreme Court of the State of California upon each of these questions is not in accord with the applicable decisions of this court, but is in direct conflict therewith and with the tenth amendment to the constitution of the United States.

Terrace vs. *Thompson*, 263 U. S. 197;
Kidd vs. *Pearson*, 128 U. S. 1, 21;
Humphreys vs. *McKissoch*, 140 U. S. 304, 312;
Hollins vs. *Brierfield Coal and Iron Co.*, 150 U. S. 371, 382;
Hale vs. *Henkel*, 201 U. S. 43, 74;
Paul vs. *Virginia*, 8 Wall, U. S. 168, particularly 181 and 182;

Dartmouth College vs. *Woodward*, 4 Wheat, U. S. 518;
Head vs. *Providence Ins. Co.*, 2 Cranch., U. S. 127, 168;
Geoffroy vs. *Riggs*, 133 U. S. 258, 267;
French Republic vs. *Saratoga Vichy Co.*, 191 U. S. 427, 439;
Visconte Gesellschaft vs. *Umberit*, 208 U. S. 570, 581;
U. S. vs. *Cruikshank*, 2 Otto U. S. 542, 550;
Slaughterhouse Cases, 16 Wall. U. S. 36, particularly 74 to 80; and
McCulloch vs. *Maryland*, 4 Wheat. 316.

We respectfully refer the court to the brief heretofore filed in this action and entitled "Brief of Plaintiffs in Error," wherein the pertinent parts of the foregoing decisions are quoted and discussed and wherein the inconsistencies between the cases cited and the decision of the Supreme Court of the State of California are pointed out.

We therefore respectfully ask the court to consider our *petition for writ of error* together with our *assignment of errors* and *prayer for reversal* as being a petition for *certiorari* and to review the judg-

ment of the Supreme Court of the State of California as therein requested.

Respectfully submitted.

U. S. WEBB,
Attorney General of the State of California,

ROBERT W. HARRISON,
Chief Deputy Attorney General of the State of California,

WILLIAM F. CLEARY,
Deputy Attorney General of the State of California,
Attorneys for Petitioners.

State of California,
City and County of San Francisco } ss

Robert W. Harrison being duly sworn says: That he is one of the attorneys for the petitioners above named; that he has read the foregoing Petition and knows the contents thereof and that the facts therein stated are true to the best of his knowledge, information and belief.

ROBERT W. HARRISON.

[SEAL.]

Subscribed and sworn to before me this 20th day of April, 1928.

B. GRANT TAYLOR,
Clerk of the Supreme Court of the State of California.

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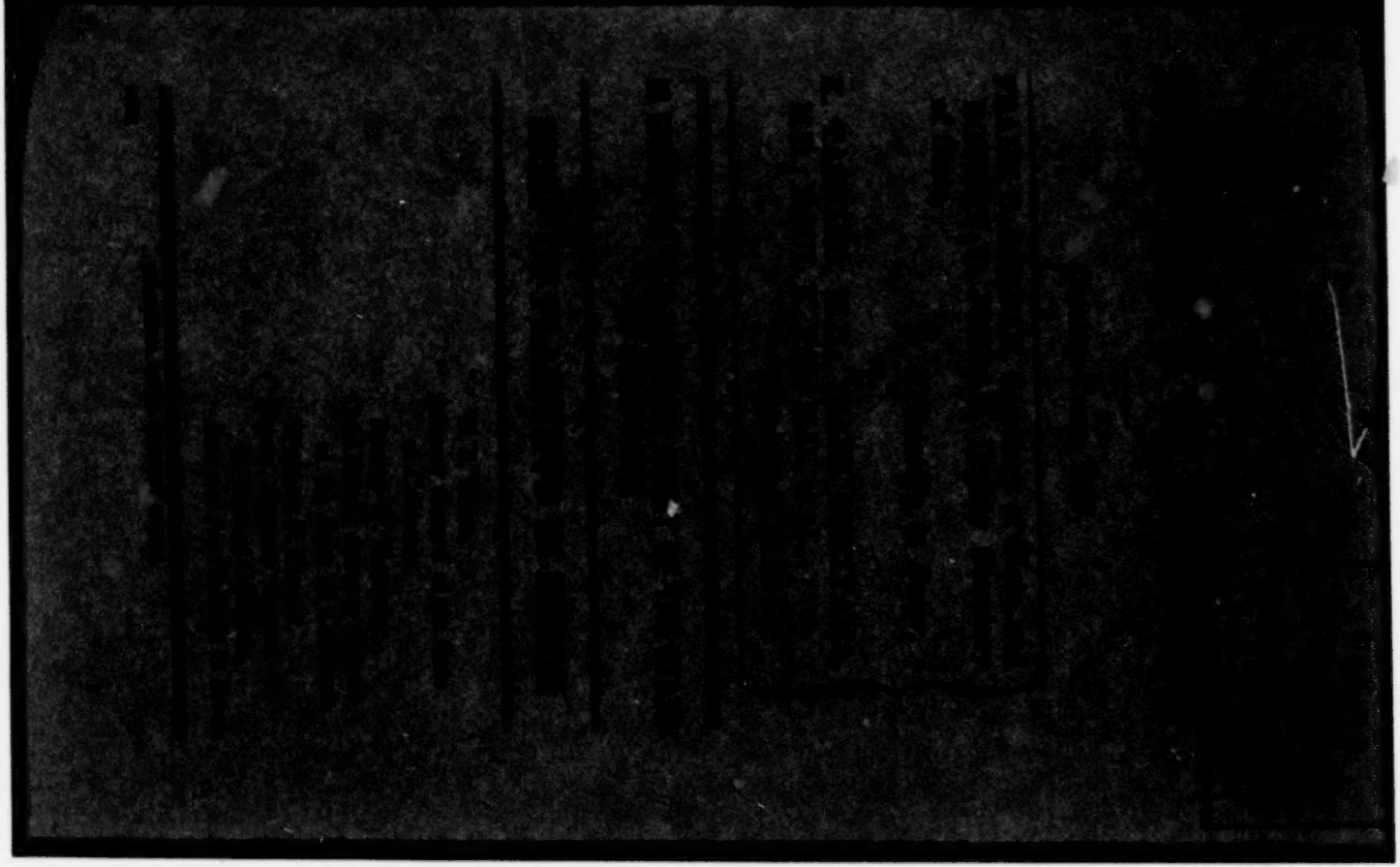

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FRANK C. JORDAN, Secretary of State, and ROBERT V. JORDAN, Deputy Secretary of State,

Plaintiffs in Error,

vs.

K. TASHIRO, M.D.; ISAMI SEKIYAMA, M.D.; PAUL K. ITO, M.D., et al.,

Defendants in Error.

BRIEF OF PLAINTIFFS IN ERROR.

PRELIMINARY STATEMENT.

The opinion of the court below is officially reported in volume 73 California Decisions (advance sheet No. 3877) at page 635. It is not yet reported in the California Reports. The judgment of the court below was rendered May 20, 1927. (R. 10.)

The defendants in error petitioned the Supreme Court of the State of California for a writ of mandamus to compel the plaintiffs in error (the Secre-

tary of State and Deputy Secretary of State of the State of California), to file certain articles of incorporation and issue a certificate of incorporation. In their petition the defendants in error alleged: that they are all citizens and subjects of the Empire of Japan, and as such are ineligible to citizenship in the United States; that they are residents of the State of California, and physicians and surgeons licensed to practice as such in the State of California; that the corporation which they are attempting to form, and of which they are the only incorporators, is to be known as the "Japanese Hospital of Los Angeles," and, by its articles of incorporation, is to be permitted to lease land upon which to erect and maintain a hospital; and, lastly, that the plaintiffs in error refused to file such articles of incorporation and to issue a corporate charter to them. In such petition the defendants in error contended that the Treaty of Commerce and Navigation between the Government of the United States and the Empire of Japan proclaimed April 5, 1911, gives to them the right, as citizens and subjects of the Empire of Japan, to incorporate in the United States, and under the laws of the State of California, the particular corporation which they are attempting to incorporate. (R. pp. 1 to 8.)

Upon a hearing of the matter the Supreme Court of the State of California rendered its decision, holding that, pursuant to the treaty, the defendants in error were entitled to the relief prayed for. (R.

pp. 10 to 19.) Subsequently the Chief Justice of that Court made an order allowing this writ of error. (R. p. 20 and pp. 30 to 32.)

The decision under review (R. pp. 10 to 19), holds that the Treaty of Commerce and Navigation between the Government of the United States and the Empire of Japan proclaimed April 5, 1911, and particularly Article I thereof, gives to the defendants in error, as citizens and subjects of the Empire of Japan, the right to incorporate a corporation under the laws of the State of California, and to provide in the articles of incorporation thereof that such corporation is authorized to lease land in the State of California upon which to erect and maintain a hospital, and that the said treaty gives to the defendants in error the further right to acquire shares of the capital stock of such corporation. The decision goes further, for by necessary inference it holds that all the issued capital stock of such a corporation may be acquired and owned by citizens and subjects of the Empire of Japan, and that even if a majority of such stock be so owned such corporation may lease land in the State of California for the purpose of erecting and maintaining a hospital thereon.

The pertinent part of Article I of the treaty mentioned reads as follows:

> "The citizens or subjects of each of the High Contracting Parties shall have liberty to enter, travel and reside in the territories of the other

to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established."

The reasoning of the Supreme Court of California may be summarized as follows:

The treaty provision gives to the defendants in error the right to do anything incident to or necessary for trade upon the same terms as native citizens or subjects; the business of conducting a hospital for profit constitutes trade and is a commercial purpose within the purview of the treaty; operating collectively through a corporation is an incident to trade; citizens and subjects of the United States are permitted to form, and operate through, a corporation for the purpose of leasing land upon which to erect and maintain a hospital; and therefore the defendants in error are by the treaty permitted to form, and operate through, a corporation for the purpose of leasing land upon which to erect and maintain a hospital.

The jurisdiction of this court is invoked under that part of subdivision (b) of section 344, Title 28 U. S. C. (p. 986) which confers jurisdiction on this court to review a final judgment or decision of the highest court of a state:

"* * * where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied."

Our Assignment of Errors contains twenty-two specifications (R. pp. 21 to 30), and we rely upon each and every one of them. However, in our statement of points upon which we intend to rely (R. pp. 33, 34), we summarized the points of law contained in the twenty-two specifications of error as follows:

I.

The use of land for the purpose of erecting and maintaining a hospital thereon is not the use of land for "commercial purposes" within the intendment of Article I of the Treaty of Commerce and Navigation between the Government of the United States and the Empire of Japan proclaimed April 5, 1911;

II.

The Treaty of Commerce and Navigation between the Government of the United States and the Empire of Japan proclaimed April 5, 1911, does not give or secure to *any* corporation, domestic or foreign, the right to transact business in the United States or in any state or territory thereof, or to acquire, possess, enjoy, use, cultivate, occupy or transfer real prop-

erty or any interest therein in the United States or in any state or territory thereof;

III.

The Treaty of Commerce and Navigation between the Government of the United States and the Empire of Japan proclaimed April 5, 1911, does not give or secure to the citizens and subjects of the Empire of Japan the right to form a corporation in the United States or in any state or territory thereof, nor does such treaty give or secure to such persons the right to become members of or acquire shares of stock in *any* corporation which either is or is not authorized to acquire, possess, enjoy, use, cultivate, occupy or transfer real property or any interest therein in the United States or in any state or territory thereof;

IV.

By reason of the facts stated in the two points next preceding, section 3 of the Alien Land Law of the State of California prohibits citizens and subjects of the Empire of Japan from becoming members of or acquiring shares of stock in a corporation authorized to acquire, possess, enjoy, use, cultivate, occupy or transfer real property or any interest therein in the State of California, and prohibits any corporation of which a majority of its members are citizens or subjects of the Empire of Japan or in which a majority of the issued capital stock is owned by such per-

cultivating, occupying or transferring real property or any interest therein in the State of California.

At this point it should be observed that the general corporation laws of California do not prohibit aliens, or aliens ineligible to citizenship, to form corporations in California. The only restriction of any character found in the laws of California which discriminates between aliens and citizens in regard to corporations is found in section 3 of the Alien Land Law of California (Statutes of California, 1921, p. lxxxiii, as amended by Statutes 1923, p. 1021; Deering's General Laws of California, part I, p. 80), which provides that:*

> "Any company, association or corporation organized under the laws of this or any other state or nation, of which a majority of the members are aliens" * * * (ineligible to citizenship under the laws of the United States) * * * "or in which a majority of the issued capital stock is owned by such aliens, may acquire, possess, enjoy, use, cultivate, occupy and transfer real property, or any interest therein, in this state, and have in whole or in part the beneficial use thereof, in the manner and to the extent and for the purposes prescribed by any treaty now existing between the Government of the United States and the nation or country of which such members or stockholders are citizens or subjects, and not otherwise. Hereafter all aliens" * * * (ineligible to citizenship under the laws of the United States) * * * "may become members

* The entire act is set forth in Appendix B of this brief.

of or acquire shares of stock in any company, association or corporation that is or may be authorized to acquire, possess, enjoy, use, cultivate, occupy and transfer real property, or any interest therein, in this state, in the manner and to the extent and for the purposes prescribed by any treaty now existing between the Government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise."

The plaintiffs in error, in refusing to file the articles of incorporation presented by the defendants in error, took the position that, as all of the incorporators of the proposed corporation were aliens ineligible to citizenship, the Alien Land Law (an initiative measure and under the Constitution of California binding upon the Legislature †) made it impossible to form such corporation and thereby confer upon it the right to acquire an interest in land in California. In other words, the plaintiffs in error refused to file such articles of incorporation because of the following statement contained in the second article:

"That the purposes for which it is formed are * * * to lease land for the purpose of this corporation; * * * to own, purchase, sell, mortgage, hypothecate, receive, either as lessor or

† "* * * No act, law or amendment to the Constitution, adopted by the people at the polls under the initiative provision of this section shall be amended or repealed except by a vote of the electors, unless otherwise provided in said initiative measure; * * *" California Constitution, Article IV, section 1.

"The Legislature may amend this act in furtherance of its purpose and to facilitate its operation." Alien Land Law, Sec. 13.

lessee, real and personal property of every kind and description * * *." (R. p. 2.)

In view of our first point, section 2 of the Alien Land Law of California should also be called to the court's attention. It provides:

> "All aliens" * * * (ineligible to citizenship under the laws of the United States) * * * "may acquire, possess, enjoy, use, cultivate, occupy and transfer real property, or any interest therein, in this state, and have in whole or in part the beneficial use thereof in the manner and to the extent, and for the purposes prescribed by any treaty now existing between the Government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise."

The Treaty of Commerce and Navigation between the Government of the United States and the Empire of Japan proclaimed April 5, 1911, is set forth in Appendix A of this brief, immediately following the blue page.

ARGUMENT.

Preliminary.

Before discussing our four points we deem it advisable to say a few words about the rule that treaties should be liberally construed; not in derogation of that rule but in an endeavor to show the reason which gave rise to it.

Treaties are contracts between sovereign nations. No nation is entirely independent in natural re-

sources. Each nation desires access to the natural resources necessary or convenient to its existence and progress. It not only desires that access, but it desires that such access shall be as free and absolute as is possible, and at least as free and as absolute as that afforded to other nations. But access to such natural resources may not be had unless compensation is given to the other nations in exchange for the use of the latter's natural resources. This requires that each nation shall be afforded an outlet for its own products, or, in other words, that its nationals shall be permitted to sell, as well as buy, in the markets of other nations, and that while so trading they shall be accorded rights and protection.

At this point another element enters. Each nation is jealous of its sovereignty and desires to give no right to any other nation which limits or impairs, or is likely to limit or impair, that sovereignty. Consequently, we find in all *reciprocal* treaties an attempt to foster a free and mutual commercial intercourse between the contracting nations without either one giving to the other any right not indispensable to such intercourse. This result is generally accomplished by granting certain *specific* rights, and by providing that in *certain* other respects each of the contracting parties shall have the rights accorded to the most favored nation. This form of treaty reserves unimpaired nearly all the sovereign rights originally possessed, that is: except for rights specifically granted, each nation is left

free to enact such laws regulating the activities of foreigners as it sees fit so to do, provided that by such laws the nationals of the nation granted *certain* rights of the most favored nation are not discriminated against in regard to *those* rights.

Our purpose in italicizing the words *certain* and *those* in the foregoing paragraph was to impress upon the court that *most favored nation* clauses are generally limited in their terms to specific classes of rights, and but rarely grant all the rights accorded the most favored nation. (The Treaty of Commerce and Navigation with Japan contains six *most favored nation* clauses, each dealing with a separate class of rights. See Appendix A, articles III, IV, XI, XII, XIII, XIV.)

The specific rights granted by treaty are naturally couched in restricted phrases which fail to mention numerous incidental rights upon which the rights granted depend for efficacy. That is to say, hardly any right can be exercised without bringing into play some other right. For example: the right "to come with their ships and cargoes to all places, ports and rivers in the territories of the other which are or may be open to foreign commerce" * would be a useless right without the privilege of landing cargo.

As we view the matter, the rule that treaties should be liberally construed was formulated to meet the situation indicated in the preceding paragraph.

* This clause, or the equivalent, is found in nearly every treaty of commerce and navigation. It is in Article IV of the treaty with Japan. See Appendix A.

The function of that rule is to give effect to the limited rights specifically granted by treaty, for a rule of strict construction would sweep away all privileges necessarily incident to the convenient exercise and enjoyment of the rights specifically granted, leaving them hollow and useless.

In giving life and effect to the rights and privileges specifically granted by treaty the rule of liberal construction serves a commendable purpose, for it makes the intention of the contracting parties capable of fulfillment, fosters a free intercourse between nations, and promotes international good will. But the rule of liberal construction has its limitations and if it is made to exceed them it is likely to work harm rather than good. The *primary* rights granted by treaty, the rights which are specifically mentioned, are usually couched in the most explicit terms and are the broadest *general rights* which the contracting nations are willing to grant to each other.

Each nation has a state department, or what corresponds to a state department, manned by experts of many different kinds, including those whose business it is to analyze every available treaty for the purpose of ascertaining what rights have been granted and what rights have been denied to every nation by every other nation. Only by so doing can a nation know what rights it must secure in order to place itself on a parity with other nations and what rights it must withhold so as not to be placed at a

disadvantage in international relations. Having made such a study, it behooves each state department to so draft its treaties that all rights intended to be obtained are specified in words which *clearly and fully* cover those rights, and which do not grant rights not intended to be granted. If the rule of liberal construction is applied so as to include within the rights specifically granted rights of a *general* or *primary* character not clearly comprehended by the language employed, then the intention of the contracting parties is not only ignored, but is defeated, in that, by such construction, rights are held to be included which the contracting parties intentionally withheld. Furthermore, under such an application of the rule, reciprocal treaties would lose their mutuality, for there would be no assurance that the courts of both nations would construe the terms of a treaty with the same degree of liberality.

It should be observed that in the preamble of the present treaty the high contracting parties expressed as their purpose "the fixation in a manner *clear* and *positive* the rules which are hereafter to govern the commercial intercourse between their respective countries."

It is fundamental that the object in construing contracts is to ascertain the intentions of the contracting parties so that those intentions may be carried into effect. Rules of construction are formulated to assist in the accomplishment of that object, and that

is their only function: they can never be legitimately applied so as to supersede or defeat that object.

Rules of construction are but marks which blaze a path, they are not the path itself.

Treaties are drawn so as to withhold rights as well as to grant them. In the words of a former Chief Justice* of this court, "enumeration presupposes something not enumerated * * *."

The following cases support our contention:

The Amiable Isabella, 6 Wheaton (U. S.) 1, 71.

"In the first place, this court does not possess any treaty-making power. That power belongs by the constitution to another department of the government; and to alter, amend or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be, on our part, an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty. Neither can this court supply a *casus omissus* in a treaty, any more than in a law. We are to find out the intention of the parties, by just rules of interpretation, applied to the subject matter; and having found that, our duty is to follow it, so far as it goes, and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind."

Geofroy vs. *Riggs*, 133 U. S. 258, 271.

"It is a general principle of construction, with respect to treaties, that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity

*Chief Justice Marshall in *Gibbons* vs. *Ogden*, 9 Wheat. 1, on p. 196.

between them. As they are contracts between independent nations, in their construction, words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended. And it has been held by this court that where a treaty admits of two constructions, one restrictive of rights that may be claimed under it, and the other favorable to them, the latter is to be preferred."

The Neck, 138 Fed. 144, 147.

"International treaties are usually, if not invariably, prepared with great care by men of learning and experience, accustomed to select words apt to express precisely and fully the intention of the contracting parties. Therefore, a reasonable, rather than a liberal, construction must be given to agreements solemnly entered into by nations; and there is no authority for reading into an international treaty, under the guise of construction, extraordinary provisions not necessary to give full effect to the intention expressed."

FIRST POINT.

The use of land for the purpose of erecting and maintaining a hospital thereon is not the use of land for "commercial purposes" within the intendment of Article I of the Treaty of Commerce and Navigation between the Government of the United States and the Empire of Japan proclaimed April 5, 1911.

The only provision of the treaty under review

which deals with the right to lease land is the initial paragraph of Article I. It reads as follows:

> "The citizens or subjects of each of the High Contracting Parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established."

The court below, in the case of *State of California* vs. *Tagami*, 195 Cal. 522, 528 (upon which case the decision under review is made to rest, R., p. 13), said:

> "The question in this case turns upon the meaning to be given to the term 'commercial purposes' as used in the foregoing clause of Article I of said treaty. Looking to its immediate context in said article, this phrase would seem to be intimately linked up with the term 'trade,' as twice employed in said article in defining the liberties and activities of those persons, the citizens or subjects of each of the contracting parties, for whose benefit the treaty was made. (2) The words 'trade' and 'commerce' are frequently found in conjunction or juxtaposition in treaties between nations and in those constitutions and laws which define and regulate the scope and purposes of

such international engagements. They are also often employed by lexicographers in defining each other. When so employed, and particularly when so used in the conjunctive, they are held to impart to each other an enlarged signification which would include practically every business occupation carried on for the purpose of procuring subsistence or profit and into which, or any material part of which, the elements of bargain and sale, barter, exchange or traffic enter. Each of these terms has sometimes been subjected to two limitations which would distinguish them from unskilled labor and even from agricultural employments on the one hand and from professional employments and the exercise of the fine arts on the other. (See Standard Dictionary, 'Trade.') (3) Of these two phrases the terms 'commerce' and 'commercial' are usually given the larger signification as embracing those dealings in general which arise and are conducted in the course of business and social intercourse between individuals and peoples. (See Standard Dictionary, 'Commerce.') This enlarged signification was early in our national history imparted to the term 'commerce' by Chief Justice Marshall in the leading case of *Gibbons* vs. *Ogden*, 9 Wheat. (U. S.) 1 (6 L. Ed. 23; see also Rose's U. S. Notes), when, in defining the term as employed in our federal constitution, he said: 'Commerce undoubtedly is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches and is regulated by prescribing rules for carrying on that intercourse.' This

> enlarged meaning of the term 'commerce' has been adopted and carried down through a long line of later decisions of both federal and state tribunals and has been applied to many and varied occupations."

After citing a number of cases, the court held that a "health resort and sanitarium" was a "commercial purpose" within the intendment of the treaty provisions under review.

The language quoted by the court below from the case of *Gibbons* vs. *Ogden*, 9 Wheat. (U. S.) 1, is apt to be misleading by reason of the word *intercourse* therein contained. That word has a very broad meaning, and it would seem obvious that Chief Justice Marshall did not understand the word *commerce* to include all forms of intercourse. In that case it was contended that the word *commerce* was limited in meaning to traffic, to buying and selling, to the exchange of commodities, and did not comprehend *navigation*. It was in answer to that contention that Chief Justice Marshall used the word *intercourse*, and it is apparent that by that term he meant to include *such communications as play a direct part in the exchange of commodities*. In this connection we invite attention to the following paragraph contained in Chief Justice Fuller's dissenting opinion in the *Lottery Case*, 188 U. S. 321, 367:

> "When Chief Justice Marshall said that commerce embraced intercourse, he added, commercial intercourse, and this was necessarily so since,

as Chief Justice Taney pointed out, if intercourse were a word of larger meaning than the word commerce, it could not be substituted for the word of more limited meaning contained in the constitution."

We believe the state court attributed to the word *intercourse* a broader meaning than was intended by Chief Justice Marshall and in so doing was misled into holding that a health resort and sanitarium was a *commercial* purpose and that a hospital was also a *commercial* purpose.

That the word *commerce* has no such broad meaning as the court below would give it is made apparent by innumerable decisions of this court.

In *Paul* vs. *Virginia*, 8 Wall. (U. S.) 168, at page 183, this court, speaking through Mr. Justice Field, said:

"Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration."

In the case of *Kidd* vs. *Pearson*, 128 U. S. 1, 20, Mr. Justice Lamar quoted from *Gibbons* vs. *Ogden*, as follows:

> "'As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense and to have intended what they have said.' *Gibbons* vs. *Ogden*, *supra*, at p. 188."

Immediately following that quotation, Mr. Justice Lamar said:

> "No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufactures and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce;" (p. 20).

Justice Lamar then went on to point out that if the term *commerce* included "all such manufactures as are intended to be the subject of commercial transactions in the future * * * it would also include all productive industries that contemplate the same thing," including manufactures, agriculture, horticulture, stock-raising, domestic fisheries, mining—"in short every branch of human industry." This

court not only refused to entertain such a notion, but went further and pointed out how absurd it was.

At this point it is pertinent to observe that a hospital is even farther removed from *commerce* than are *productive industries*, for a hospital does not produce things "intended to be the subject of commercial transactions in the future." Indeed, it does not produce any *thing* or *things*.

The third case which we desire to cite is a comparatively recent one, namely: *Crescent Cotton Oil Co.* vs. *City of Mississippi*, 257 U. S. 129, 136; 42 Sup. Ct. 42, 43. In that case the court, speaking through Mr. Justice Clark, said:

> "The separation of the seed from the fibre of the cotton, which is accomplished by the use of the cotton gin, is a short, but important, step in the manufacture of both the seed and the fibre into useful articles of commerce; but that manufacture is not commerce * * *".

The decisions of this court construing the meaning of the word *commerce* as used in our Constitution do not necessarily determine the meaning of the word *commerce* as used in the Japanese treaty. We have referred to those decisions for two reasons: first, because the court below, in citing those or similar cases, made the reference necessary, and second, because the decisions of this court upon that subject form a part of the background which presumably influences our state department in its choice of words when drafting treaties.

The treaty with which we are concerned is one of "Commerce *and* Navigation." If the word *commerce* included navigation the diplomats who drafted that treaty did a useless thing in adding "and Navigation." The fact that they made such addition suggests either that they had some doubt as to whether the word *commerce* comprehended navigation, or that they understood the word *commerce* as not comprehending navigation. If the former was the case, the drafters of the treaty desired to be explicit, to leave nothing for inference: if the latter was the case, the word *commerce* was used in a more narrow sense than it was used in our Constitution.*

In the case of *Terrace* vs. *Thompson*, 274 Fed. 841 at p. 844, it is pointed out that the original draft of the treaty with which we are concerned was presented by the Imperial Government of Japan, and that in such original draft the clause pertaining to the right to lease land read:

> "* * * and to lease land for RESIDENTIAL, COMMERCIAL, INDUSTRIAL, MANUFACTURING and other lawful purposes."

In the original draft of the treaty the words

* In the treaties of the United States there are no less than sixty-two of "Commerce *and* Navigation." In addition to these treaties, we find a few treaties of "Commerce," of "Commercial Relations," of "Navigation," and etc. The navigation treaties in each instance deal with the right to navigate a particular body of water, and have nothing to do with commerce in any other way. The treaties of commerce and of *commercial relations*, except those dealing with particular subjects such as consuls and tariff arrangements covering certain specified articles, and except those treaties with inland nations and nations having no merchant marine, deal with both commerce and navigation, but in each of those the phrase "commerce and navigation" is found in the body of the treaty. (See Malloy: Treaties, and Charles: Treaties.)

residential, commercial, industrial **and** ***manufacturing*** **were unquestionably words of restricted meaning, words which were intended to apply to separately recognized forms of activity: the term** ***other lawful*** **was the term of general import, the catch-all, as it were. That general term proposed, and therefore approved, by the Japanese Government, was omitted from the treaty as signed. From this circumstance we must infer that that general term was eliminated at the request of our Government, and because our Government was unwilling to grant to the citizens or subjects of Japan the right to lease land in this country for** ***all*** **lawful purposes. Similarly we must assume that the words** ***industrial*** **and** ***manufacturing*** **proposed, and therefore approved, by the Japanese Government, were eliminated at the request of our Government, and because our Government was unwilling to grant to the citizens or subjects of Japan the right to lease land in this country for either industrial or manufacturing purposes, as distinguished from residential and commercial purposes. There is no ground for inferring that the diplomats who negotiated the treaty intended the word** ***commercial*** **to absorb the subject, matter, or any of the subject matter, of the terms found in the original draft, but omitted in the final draft, of the treaty.**

Ordinarily, in construing contracts or other documents, the existence of a ***casus omissus*** **must be inferred from the context without reference to any**

preliminary draft. But in this case we have actual and positive knowledge of the fact that the contracting parties considered three terms and intentionally omitted those terms from the final draft of the contract. We have further knowledge of the fact that subsequent to the signing of the treaty such *casus omissus* was specifically referred to in diplomatic correspondence between the contracting parties, and was made the basis of a ruling by our State Department to the effect that the use of land for agricultural purposes was not the use of land for a commercial purpose within the intendment of the treaty, though it would have been a use of land for an industrial purpose or for a lawful purpose had those terms been included within the treaty as signed. Furthermore, this court, in the cases involving the alien land laws of California and of Washington, has given judicial recognition to the existence of such *casus omissus* in the treaty. (See *Terrace* vs. *Thompson*, *supra*, and this court's decision in the same case, 263 U. S. 197.)

This is clearly a case which demands the application of the rule of construction announced by this court in the case of *The Amiable Isabella* as quoted by us *supra*.

It now becomes pertinent to ascertain what purposes were intended to be included within each one of the five categories contained in the original draft of the treaty. We may dispose of two of those categories at once: *residential* undoubtedly pertains to

places of personal and family habitation not operated for profit, and *other lawful* undoubtedly pertains to those classes of avocations and recreations not included within any one of the other four categories. We have left: commercial, industrial, manufacturing. Let us tentatively assume that *manufacturing* pertains to the business of transforming raw materials into a change of form for use, and that *commercial* pertains to the business of buying and selling physical things. Let us then ask ourselves the question: "What businesses are there which do not consist in transforming raw materials into a change of form for use or in buying *and* selling physical things and which might be classified as industrial enterprises?" First to come to mind is the transportation industry: the business of carrying persons and things for hire. Next there is the banking industry which buys and sells no physical things, nor does it transform raw materials. Third, there is the theater industry, which furnishes amusement in a purely intangible form. Again there is the laundry industry, which takes the dirt out of our clothes and smoothes them out. Next there is the advertising industry, which produces and sells ideas. Then there is the hotel industry, which furnishes us with places to sleep. We might go on indefinitely naming *industries*, popularly classified as such, which transform *no thing*, and which buy and sell *no thing*, but whose sole function is the rendering of a service. There are other industries

which do transform things or which do buy and sell, things, but whose main functions are the rendering of service. We may classify under this head the restaurant industry, the light and power industry, the cooking and illuminating gas industry, the agriculture industry, the mining industry, the oil drilling and pumping industry, the building industry and some branches of the printing industry. These businesses, these *service industries*, form no inconsiderable portion of the business of a nation.

Let us tentatively assume that the category *Industrial* pertains to those business enterprises ordinarily classed as industrial, whose main function is the rendering of an intangible service. Let us add those functions to the businesses comprehended by our tentative definitions of *commercial* and *manufacturing*. What businesses or functions remain? First there would be professional employments, such as the practice of medicine, surgery, dentistry, law, architecture, engineering, teaching, acting, singing, sculpturing, painting. Then there would be the practice of crafts: carpentry, masonry, plumbing, blacksmithing, watch-making, gold and silver smithing, weaving, tailoring and the like. Next there would be the rendering of personal service, such as domestic servants perform. Lastly, there would be the doing of unskilled labor. These business functions may be said to fall within the classification *other lawful*.

In distinguishing between commercial, industrial

and manufacturing we started out with two tentative definitions, and later added a third. Those definitions give to each term a *reasonable* and separate meaning, and we submit that the contracting parties used the terms *commercial, industrial* and *manufacturing* in the sense in which we have defined them.

The next point for us to consider is: under which one of the five categories does the hospital business fall? Let us approach our answer to that question by first considering the restaurant and hotel businesses, which have some things in common with the hospital business.

The restaurant business: (1) buys some foods (such as milk, fresh fruits, etc.) for the purpose of reselling without change of form, and so it is, in a sense, commercial; (2) it takes raw foods of many kinds, mixes and combines them, and changes their chemistry by the application of heat, and so it is, in a sense, manufacturing; (3) but upon closer inspection it will be found that the main function of a restaurant is to render a service, and that its commercial and manufacturing functions are but incidental to its main function: it is the main function of a restaurant to prepare and serve foods to people, in places and in combinations which appeal to the individual tastes or fancies of those people, and to clean up after the food has been eaten. A point which should be stressed is that the patrons of a restaurant eat the food upon the premises, and

do not carry it away in the form of goods, wares or merchandise.

An hotel may or may not have a restaurant connected with it. If it has, the restaurant part of the hotel falls under the same category as does a restaurant which is operated by itself. The lodging part of an hotel is even less commercial and less manufacturing than a restaurant: its service is more purely intangible, for the guest receives *no thing* for his money, he merely receives the use of things.

The hospital business is unquestionably a business which renders services similar to those services rendered by hotels and restaurants. It also renders other services, such as supplying operating rooms, surgical equipment and the attention of physicians, surgeons and trained nurses. It therefore clearly falls under the category of industrial: its buying *and* selling activities, such as the buying and selling of bandages, salves, ointments and etc., is purely incidental to its main function of rendering service.

We do not wish to be understood as contending that the citizens and subjects of Japan may not conduct a hospital business in California, or that they may not conduct in California those businesses which fall under the category of industrial. Neither do we contend that the treaty does not give to the citizens and subjects of Japan the right to conduct such businesses in California. Those matters are beside the issue involved in this case. What we do contend is that they may not, and that the treaty

does not give them the right to *lease land* in California for the purpose of conducting a hospital thereon or for the purpose of conducting thereon those businesses which fall under the category of industrial. As far as we are aware, the citizens or subjects of Japan may engage in any lawful business in California which can be conducted without *leasing land*, and the hospital business can be so conducted by leasing *a building* suitable for the purpose.

The initial paragraph of the first article of the treaty gives to the citizens and subjects of Japan the right "to own or lease and occupy houses, manufactories, warehouses and shops," and there is no limitation in the treaty as to the purposes for which such buildings may be owned or leased and occupied. The restriction as to *purposes* is confined to the leasing of *land*. The two treaty clauses, one referring to buildings, and the other to land, show an intent to permit a greater interest in real property for a lesser number of purposes, and a lesser interest in real property for a greater number of purposes. This thought is given support by the initial sentence of Article II of the treaty, which reads as follows:

> "The dwellings, warehouses, manufactories and shops of the citizens or subjects of each of the High Contracting Parties in the territories of the other, and all premises appertaining thereto used for purposes of residence or commerce, shall be respected."

In this instance the phrase "used for the purposes of residence or commerce" modifies the phrase "all premises appertaining thereto," and does not limit or modify "dwellings, warehouses, manufactories and shops." Thus the unmistakable implication is that "dwellings, warehouses, manufactories and shops" might be used for purposes other than "residence or commerce," and if put to such other use were entitled to respect, but that "premises appertaining" to such "dwellings, warehouses, manufactories and shops" are entitled to respect only if they are "used for purposes of residence or commerce."

A distinction between the lease of land and the lease of a building by a foreigner was recognized at common law. In the case of *Terrace* vs. *Thompson*, 274 Fed. 841 on p. 851, the following quotation from "Coke upon Littleton, Book 1, Chapter 1, 2b, subhead 'Of Fee Simple,'" is found:

> "'But as to a lease for yeares, there is a diversitie betweene a lease for yeares of a house for the habitation of a merchant stranger being an alien, whose king is in league with ours, and a lease for yeares of lands, meadows, pastures, woods and the like. For if he take a lease for yeares of lands, meadows, etc., upon office found, the king shall have it. But of a house for habitation he may take a lease for yeares as incident to commerce; for without habitation he can not merchandise or trade. But if he depart, or relinquish the realme, the king shall have the lease. So it is if he die possessed thereof neither his executors or admin-

istrators shall have it, but the king; for he had it only for habitation as necessary to his trade or traffique and not for the benefit of his executor or administrator. But if the alien be no merchant, then the king shall have the lease for yeares, albeit it were for his habitation; and so it is if he be an alien enemie. And all this was so resolved by the judges assembled together for that purpose in the case of Sir James Croft. Pasch. 29, of the raigne of queene Elizabeth.' "

In concluding our argument under this point we wish to call the court's attention to the fact that even if it be held that a hospital is a commercial purpose within the intendment of this treaty, still the defendants in error are not entitled to the relief prayed for by them, because of the fact that in the second article of their proposed articles of incorporation they have not only claimed the right to lease land for the purposes of the proposed corporation, but they have claimed the right "to *own, purchase,* sell, mortgage, hypothecate and receive, either as lessor or as lessee, *real* and personal property *of every kind and description.*" (R., p. 2.)

SECOND AND THIRD POINTS.

Our next two points are stated as follows:

II. The Treaty of Commerce and Navigation between the Government of the United States and the Empire of Japan proclaimed April 5, 1911, does not give or secure to any corporation, domestic or foreign, the right to transact business in the United States or in any state

or territory thereof, or to acquire, possess, enjoy, use, cultivate, occupy or transfer real property or any interest therein in the United States or in any state or territory thereof.

III. The Treaty of Commerce and Navigation between the Government of the United States and the Empire of Japan proclaimed April 5, 1911, does not give or secure to the citizens and subjects of the Empire of Japan the right to form a corporation in the United States or in any state or territory thereof, nor does such treaty give or secure to such persons the right to become members of or acquire shares of stock in any corporation which either is or is not authorized to acquire, possess, enjoy, use, cultivate, occupy or transfer real property or any interest therein in the United States or in any state or territory thereof.

Although these two points are distinctly separate in substance, their background is a common one, and needless repetition can be avoided by considering them together. They arise out of the fact that the court below held that the treaty grants to the citizens or subjects of Japan residing in the State of California the right to form a corporation in the State of California and under its laws, to acquire and own shares of stock in such corporation, to provide in the articles of incorporation thereof that such corporation is authorized to lease and occupy land in the State of California, and that the State of California is powerless to prevent such things from being done.

It was conceded by the court below that the treaty does not specifically grant such rights to the citizens

or subjects of Japan, but it was held that such rights were granted by that clause of Article I of the treaty which reads:

> "* * * and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects * * *."

I.

The first error of the court below was in assuming that incorporating is "incident to or necessary for trade" within the purview of the treaty.

This court, in the case of *Terrace* vs. *Thompson*, 263 U. S. 197, in construing this very treaty provision held that the business of truck farming was not incident to or necessary for the business of trading in truck farm products, even though the farmer and the trader were one and the same person. The District Court, in its decision of the same case (274 Fed. 841, 846), said:

> "In the most liberal construction of this language that may be indulged in it can not fairly be said that truck farming is incidental to trading, either wholesale or retail, in the products of a farm, any more than conducting a sheep ranch or growing mulberry trees is incidental to the dry goods trade."

From this we infer that the incidence or necessity required by the treaty must be interstitial, and that a superficial incidence or necessity will not suffice to bring an act or a transaction within the operation

of the treaty provision. Were this not the case, then it would follow that every branch of human activity would be incident to or necessary for trade within the purview of the treaty, for so complex is our civilization that if a trader followed his contracts in sequence to their ultimate conclusion he would embrace every human activity and every member of society. (See *Kidd* vs. *Pearson*, 128 U. S. 1, 21.)

Within this view of the matter incorporating is not incident to or necessary for trade: whatever connection it has with trade is purely superficial. The primary or external business of a corporation, the business which it transacts with the public, is completely severable from its secondary, or internal, business, namely: its dealings with its stockholders or members. Incorporating is no more incidental to the business of trading than forming a municipal government is incidental to the business of paving streets.

Another reason why incorporating is not and can not be "incident to or necessary for trade" within the intendment of the treaty is because the word *trade* as there used includes only the trade *of the persons* who are given the right to do anything incident thereto or necessary therefor, whereas the trade of a corporation is not the trade of such persons.

The treaty clause to which we are now referring is but the inclusion within the body of the treaty of the rule that treaties should be liberally construed, its purpose being to grant to the nationals of the contracting

parties the right to do those things which are incident to or necessary for the exercise and enjoyment of a right specifically granted in a former clause of the treaty, namely: the right to carry on trade, wholesale and retail. In order to show that incorporating is incident to or necessary for trade within the intendment of this provision, it must be shown that such incorporating is incident to or necessary for the trade of the individual incorporators, that is, is incident to or necessary for *their* business as traders.

A corporation is a legal entity separate and distinct from those entities who incorporate, or own or conduct it: the business conducted by a corporation, the trade which it transacts is the trade and business of the corporate entity—it is not the trade or the business of its incorporators, stockholders or employees. When individuals turn their trade or their business over to a corporation it ceases to be their business or their trade—their dealings as individuals are thenceforth with the corporation and not with the public, and whatever contact they have with the public in regard to that business or trade is as agents of the corporation.

Humphreys vs. *McKissock*, 140 U. S. 304, 312;
Hollins vs. *Brierfield Coal & Iron Co.*, 150 U. S. 371, 382;
Hale vs. *Henkel*, 201 U. S. 43, 74.

Consequently, incorporating is not and can not be incident to or necessary for the trade of the individuals who organize, or own or conduct a corporation.

It may be argued that, in distinguishing between the trade of individuals and the trade of a corporation owned by those individuals, we are making use of a legal fiction recognized in our own country, but not recognized, or even understood, in Japan; that a more liberal view of the matter should be taken, namely: that individuals *do* conduct their trade through corporations, and that corporations have no real existence as entities, but are merely groups of individuals banded together in a particular way for the purpose of transacting *their* business.

We recognize the force of such argument, but we are bound by the treaty, which, in no uncertain terms, recognizes the distinction between trade conducted by individuals and trade conducted by corporations.

The treaty permits nationals of Japan to carry on trade in this country. If the trade of a corporation were considered as being the trade of its stockholders, it would follow that a national of Japan has the *right* to carry on, in this country, the trade of a Japanese corporation in which he was a stockholder. However, a national of Japan has no such *right* for Article VII of the treaty provides:

> "Limited-liability and other companies and associations, commercial, industrial and financial, already or hereafter to be organized in accordance with the laws of either High Contracting Party and domiciled in the territories of such Party, are authorized, in the territories of the other, to exer-

cise their rights and appear in the courts either as plaintiffs or defendants, subject to the laws of such other Party.

The foregoing stipulation has no bearing upon the question whether a company or association organized in one of the two countries will or will not be permitted to transact its business or industry in the other, this permission remaining always subject to the laws and regulations enacted or established in the respective countries or in any part thereof."

The words *permitted* and *permission* are of particular significance, for they require affirmative authorization, not merely lack of prohibition. So, also, is the clause "or in any part thereof" of particular significance, because, in so far as this country is concerned, it leaves the matter of granting or denying permission to the several states. This is in conformity with the established law of this country relating to the rights of corporations as distinguished from the rights of individuals as announced by this court in the case of *Paul* vs. *Virginia*, 8 Wall. (U. S.) 168, 181, 182. In any event, it is obvious that the treaty recognizes and embodies a distinction between the business of a *foreign corporation* and the business of *foreign* individuals, and there is no logical reason why the same distinction should not be recognized between the business of *foreign individuals* and the business of a *domestic corporation*.

The court below failed to make such a distinction.

That failure may be attributed to the fact that the defendants in error are seeking to incorporate a hospital corporation supposedly for the purpose of facilitating them in the practice of their profession. It was evidently assumed by the court below that the corporation which the defendants in error are seeking to incorporate would function in much the same way as a partnership would function. Thus the court below directed its attention to the ostensible purpose of the incorporators rather than to the latent features with which every corporation is endowed. That court failed to realize that the original incorporators would not be bound either to retain their interest in the corporation to the exclusion of persons not qualified to operate it nor to personally render those services necessary to its operation. It is conceivable that all of the capital stock of such corporation might become owned by persons having no contact with the corporation except as stockholders, and of whom it could not be said that they were using the corporation to facilitate them in carrying on their individual businesses or vocations.

II.

The second error of the court below was in failing to realize that the treaty clause granting to the citizens and subjects of Japan the right:

> "*to do* anything incident to or necessary for trade upon the same terms as native citiens or subjects"

merely assures to them a liberty *of their own action*,

and does not require or compel *affirmative* action upon the part of others. The importance of this oversight is made apparent when we realize that a corporate charter is a contract between the sovereign issuing it and the incorporators.

Dartmouth College vs. *Woodward*, 4 Wheat. (U. S.) 518;

Crease vs. *Babcock*, 23 Pick. (Mass.) 334; 34 Am. D. 61;

Abbott vs. *J. G. and K. Horse R. Co.*, 80 N. Y. 27; 36 Am. R. 572;

Lawrence vs. *Rutland R. Co.*, 80 Vt. 370; 67 A. 1091; 15 L. R. A. (N. S.) 350.

The forming of a corporation—the endowing it with life—is something which individual persons can not do of and by themselves. To form a corporation such persons must enter into a contract with the sovereign, *and the sovereign must enter into a contract with them.* Furthermore, the sovereign, by such contract, bestows upon the incorporators and their successors in interest, *as individuals*, certain privileges and immunities which they did not before possess, and bestows upon the corporation, as an independent entity, all of the rights and privileges which it enjoys.

One of the many privileges which incorporators and their successors in interest acquire as the result of such contract is the right to a limited personal liability for the obligations arising out of their joint venture. That right they do not possess before the

contract of incorporation is entered into, and they have no power to bestow it upon themselves. In this respect the defendants in error have no greater rights than citizens of the United States. The treaty does not give them the right to a limited personal liability, it merely confers upon them the right *to do* certain things upon the *same terms* as native *citizens or subjects.* As the term *citizens or subjects* includes only natural persons (see *Paul* vs. *Virginia, supra*) the treaty gives to the citizens or subjects of Japan only those rights and privileges enjoyed by natural persons who are citizens or subjects of the United States, and with those rights and privileges go the burdens and liabilities borne by native citizens or subjects when acting in their natural capacity.

The very fact that the defendants in error are endeavoring to compel the State of California to issue a corporate charter to them is a confession by them that they wish to exercise rights which they do not now possess, and that they wish to have those rights conferred upon them *by the State of California.*

In the early case of *Head* vs. *Providence Ins. Co.,* 2 Cranch. (U. S.) 127, 167, Chief Justice Marshall, speaking for this court, said that a corporation:

> "—may correctly be said to be precisely what the incorporating act has made it, to derive all its powers from that act, and to be capable of exercising its faculties only in the manner which that act authorizes."

That case was decided before the era of general

corporation laws, and consequently the language used is not strictly applicable to a corporation organized under general law. But the meaning conveyed by Chief Justice Marshall is unmistakable. It is that a corporation derives all of its powers from the sovereign that grants it its charter, and that it possesses only such powers as that sovereign bestows upon it. This means that the incorporators of a corporation, be they citizens or aliens, have not the power or capacity to bestow any powers upon a corporation.

The Japanese treaty, although conferring upon citizens or subjects of Japan the right to lease land in California for commercial purposes, confers that right only upon citizens or subjects of Japan, and neither expressly nor by implication does it confer or attempt to confer that right upon corporations created under the laws of California or of any other state or nation. A corporation created under the laws of California is neither a citizen nor a subject of Japan, nor is it a citizen or subject of the United States in the sense in which those terms are used in the Constitution of the United States and in treaties entered into by the United States pursuant to authority granted by the Constitution. (See *Paul* vs. *Virginia, supra;* also compare Articles I and VII of Appendix A.) And this is so no matter what the nationality of the incorporators.

The court below assumed that because the defendants in error are given the right by treaty to

lease land for commercial purposes any corporation of which they were incorporators would likewise have that right. In other words, the court below assumed that a corporation is entitled to possess all rights and powers possessed by its incorporators as individuals. Such an assumption is so out of harmony with all law upon the subject of corporations that further comment upon our part is unnecessary.

III.

The most serious error of the court below was in holding that the federal government may, and in the Japanese treaty has attempted to, compel the several states to issue corporate charters against their will.

As we have seen, a corporate charter is a contract. One essential element of *every* contract is that the party to be bound must be legally and mentally capable of forming and acting under a free will, and must perform some voluntary act upon which a contractual obligation can be predicated. Another essential element of every *proper* contract is a meet-of minds, an agreement between the parties: that is impossible where one party has a positive will not to enter into a contract and is forced to do so against that will. Thus the court below set aside the very fundamentals of the law of contracts in order to reach its decision. More serious still, the decision of the court below directs a mortal blow against the

organic structure of our dual system of government, for if the federal government has the power to compel the several states to enter into contracts against their will then those states are no longer separate sovereignties, but are the mere puppets of the federal government, and state legislatures, instead of being discretionary and deliberative organs of state governments, are mere ministerial organs of the federal government, bound to follow the dictates of that government even as against their own judgment and the expressed will of the people they are supposed to represent.

In the case of *Geofroy* vs. *Riggs*, 133 U. S. 258, 267, this court said that "it would not be contended that" the treaty-making power "extended so far as to authorize * * * a change in the character of the government or of that of one of the states * * *"

The defendants in error will probably attempt to justify the holding of the court below on the theory that under the treaty-making power the federal government may, and in the present treaty has sought to, relieve the subjects of a foreign power of the disabilities of alienage, and that when such is done the several states may not discriminate against the subjects of that foreign power because of their lack of citizenship.

Subject to one limitation that theory is correct: when aliens are relieved of the disabilities of alienage they are but placed upon an *equality* with citizens, and consequently in those matters in which a

state may discriminate between citizens a state may discriminate between a citizen and an alien having the status of a citizen.

Another way of stating the same limitation is that the federal government can only vest an alien with those privileges and immunities which it may grant or secure to its own citizens. Even the most ardent federalist would not have dared to have contended that the states which ratified the Constitution intended to vest the federal government with authority to confer upon aliens greater or more extensive privileges or immunities than they were willing to confer upon citizens of the United States or than their own citizens were entitled to claim as right in the other states of the Union. But if it be conceded that the federal government possesses that authority it is clear that no attempt has been made to exercise it in the present treaty, for the treaty grants to certain aliens the right to do certain things "upon the *same terms* as native citizens or subjects," and the term "native citizens or subjects" refers to persons who are native citizens or subjects of one or the other of the contracting parties, that is: of "The Empire of Japan" or of "*The Government of the United States.*"

French Republic vs. *Saratoga Vichy Co.*, 191 U. S. 427, 439;

Disconto Gesellschaft vs. *Umbreit*, 208 U. S. 570, 581.

The privileges and immunities which the federal

government may grant or secure to its own citizens are limited to subject matters expressly placed under the jurisdiction of the federal government by the Constitution.

U. S. vs. *Cruikshank*, 2 Otto (U. S.) 542, 550.

Over subject matters not so placed under the jurisdiction of the federal government the federal government has *no* control, and the several states, in their respective territories, are as free to act as they would be were there no federal government.

Tenth Amendment to the Constitution of the United States;

Slaughterhouse Cases, 16 Wall. (U. S.) 36, particularly pp. 74–80;

U. S. vs. *Cruikshank*, *supra*.

It is only when the action of a state encroaches upon the constitutional jurisdiction of the federal government that the federal government has the authority to intervene.

It will not be disputed that the several states have the right to enter into contracts. That right necessarily carries with it the right to discriminate between persons. Indeed, every contract is in itself a discrimination against all persons who are not parties to it, for it grants to its parties rights which it does not grant to outsiders.

A state in entering into contracts for the construction of highways or of buildings of necessity must discriminate between citizens, for otherwise *every*

citizen would be entitled to receive a contract from the state to construct *every* highway and *every* building which the state decided to have built under contract. And this is true of all ordinary contracts to which a state is a party.

While there is no absolute necessity that the states discriminate between persons or between citizens in the matter of entering into those contracts known as corporate charters, yet it can be easily demonstrated that the several states, and the people thereof, possess the right to do so, and that the federal government can not interfere with the exercise of that right, even by treaty.

The treaty-making power of the federal government is substantially the same today as it was when the first ten amendments to the Constitution went into effect. That power has never been expressly enlarged nor diminished by constitutional amendment, and for our present purpose we may safely disregard the resulting changes in that power which have been occasioned by the adoption of the last nine amendments and assume that if the federal government now has the power by treaty to prevent a state from discriminating against the subjects of a foreign power in the matter of issuing corporate charters, it had that power at the time the first ten amendments to the Constitution went into effect.

At that time, and for many years thereafter, all corporate charters were issued by state legislatures by means of special enactments: each petition for a

corporate charter was passed upon by the legislature as a special measure. The legislature could take into consideration the financial standing, the reputation, the nationality, and even the politics of the incorporators: indeed, there was nothing which the legislature could not consider. Consequently there was no uniformity in the corporate charters issued, nor was there any uniformity in the granting or denying of corporate charters applied for. No individual or group of individuals had the right to demand that a corporate charter be issued to them, nor had any individual or group of individuals the right to demand that any definite form of corporate charter be issued. The whole matter was one of negotiation between the incorporators and the legislature, and each corporate charter was separate and distinct from every other corporate charter. It therefore follows that at such time there was no way in which the federal government could have prevented the states from discriminating against any particular person or class of persons in the issuance of corporate charters without itself assuming complete jurisdiction over the subject. This it was prevented from doing by the tenth amendment to the Constitution of the United States. See *McCulloch* vs. *Maryland*, 4 Wheat. 316, and *Slaughterhouse Cases, supra.*

While the states generally have changed to a system of issuing corporate charters under general laws, those changes have been made by the states

voluntarily, and they have the right to revert at any time to the old system of issuing corporate charters under special statutes. Furthermore, the people of the several states, in restricting the powers of their agents to discriminate between individuals in issuing corporate charters, have not restricted or limited their own right to so discriminate; they could only do so by amending the federal Constitution. The Alien Land Law of the State of California (an initiative measure, and, under the Constitution of the State of California, binding upon the state legislature) is an instance in which the people of a state have limited the power of their agent to enter into contracts of incorporation, and at the same time have exercised their right to discriminate between individuals in regard to the issuance of corporate charters. That is to say, that law prohibits a corporation of which a majority of its stock is owned by aliens ineligible to citizenship to own or acquire any interest in land in the State of California (except when permitted by treaty), and consequently the legislature, being the agent of the people of the State of California, can not grant to such a corporation, by corporate charter or otherwise, the right to own or acquire an interest in land in California.

Summary as to Second and Third Points.

At the outset we said that our second and third points were distinctly separate in substance, but that their background was a common one, and that

needless repetition could be avoided by considering them together. We have now completed our consideration of that background, so we proceed to a consideration of the separate points.

Both points involve the construction of a single clause of the Japanese treaty, namely: the clause granting to the *citizens or subjects of Japan* the right

> "to do anything incident to or necessary for trade upon the same terms as native citizens or subjects."

The question presented by our second point is whether or not that clause gives to a corporation, whether organized in California or in any other state or nation, the right to lease land in California for any purpose. We have pointed out that the treaty clause under consideration grants rights only to *citizens or subjects* of the contracting parties, and that the term "citizens or subjects" refers to natural persons, and does not include corporations. Upon such showing we submit that the clause in question does not confer *any* right upon *any* corporation, no matter where incorporated and no matter who the incorporators are, and more particularly that such clause is not capable of being construed as conferring upon a California corporation the right to lease land in California.

The question presented by our third point is whether or not the treaty clause quoted gives to the citizens or subjects of Japan the right to incorporate in the State of California and under its laws. We

have pointed out that such clause grants (to citizens and subjects of Japan) only such rights as are possessed and enjoyed by citizens or subjects of the United States, when acting in their natural capacity, and that the rights which the incorporators and stockholders of a corporation possess and enjoy as the result of incorporation are not possessed or enjoyed by citizens or subjects of the United States when acting in their natural capacity. We have also pointed out that the clause only grants to the citizens or subjects of Japan a liberty of their own action, and does not require affirmative action upon the part of others, whereas incorporation necessitates the affirmative act of the sovereign issuing the corporate charter. Another showing upon our part has been that the treaty only grants the right to do those things which are incident to or necessary for trade, and that incorporating is not and can not be considered as being incident to or necessary for trade within the intendment of the treaty. Thus we have presented three reasons why the treaty clause *can not* be construed as granting to citizens or subjects of Japan the right to incorporate in the State of California and under its laws. But we have not stopped there, for we have presented three reasons why the treaty clause ***should not*** be construed as granting, or attempting to grant, such right to citizens or subjects of Japan, namely: because such a construction (1) would nullify the fundamentals of the law of corporations; (2) would nullify the fundamentals of the law of

contracts; and, (3) would destroy the organic structure of our dual system of government.

The last reason mentioned is not only a reason why the treaty clause should not be construed as the court below and the defendants in error would construe it, but it is also a good and sufficient reason why such treaty clause should not be given such effect should it be decided that the contracting parties intended it to have such a broad application.

FOURTH POINT.

By reason of the facts stated in the two points next preceding, section 3 of the Alien Land Law of the State of California prohibits citizens and subjects of the Empire of Japan from becoming members of or acquiring shares of stock in a corporation authorized to acquire, possess, enjoy, use, cultivate, occupy or transfer real property or any interest therein in the State of California, and prohibits any corporation of which a majority of its members are citizens or subjects of the Empire of Japan or in which a majority of the issued capital stock is owned by such persons from acquiring, possessing, enjoying, using, cultivating, occupying or transferring real property or any interest therein in the State of California.

This point is directed against the holding contained in the concluding paragraph of the opinion of the court below. (See Record, pp. 18 and 19.)

Section 3 of the Alien Land Law of California* is the very antithesis of a grant of right: its manifest purpose is to withdraw a certain class of rights from

*See Appendix B of this brief.

aliens ineligible to citizenship, and to do so to the very limit of the state's authority. The exception twice contained in that section does not grant any right; it merely recognizes those rights which the federal government has in fact granted to aliens ineligible to citizenship, and that recognition is made with reluctance. This is made evident by the following circumstances:

(1) Section 3 of the Alien Land Law recognizes as being possessed by an alien ineligible to citizenship only those rights which are conferred upon him by a treaty between the Government of the United States and *the* nation or country of which *he* is a citizen or subject. In other words, all aliens ineligible to citizenship are not recognized as possessing the same rights: the rights recognized spring not from the fact that their possessor is an alien ineligible to citizenship, but from a treaty between the Government of the United States and the *particular* nation or country of which the *particular* alien is a citizen or subject.

(2) The expression "treaty now existing between the Government of the United States and the nation or country of which such alien is a citizen or subject" requires a valid treaty, for a void treaty, or a void treaty stipulation, has no present existence between nations; it is not operative; it grants no rights.

(3) Lastly, and most important of all, the expression "and not otherwise" twice found in section 3 of the Alien Land Law of California, and ignored

by the court below, leaves no room for doubt: it is an unequivocal term of exclusion.

The evident purpose for which the twice-stated exception was inserted in section 3 of the Alien Land Law was not to grant rights, but was to prevent that statute from being declared void because of a conflict between it and a supreme law of the land.

CONCLUSION.

We respectfully submit that the defendants in error are not entitled to the relief prayed for by them, and that the decision of the court below is erroneous in the particulars set forth in this brief.

Wherefore, the plaintiffs in error, Frank C. Jordan and Robert V. Jordan, pray that the judgment of the Supreme Court of the State of California dated May 20, 1927, be reversed, and that judgment be rendered in favor of said plaintiffs in error, and for costs.

Dated: February 10, 1928.

U. S. Webb,
Attorney General of the State of California,
Robert W. Harrison,
Chief Deputy,
William F. Cleary,
Deputy,
Attorneys for Plaintiffs in Error.

APPENDIX A.

TREATY OF COMMERCE AND NAVIGATION WITH JAPAN.

(February 21, 1911.)

[Signed at Washington, February 21, 1911; ratification advised by the Senate, with amendment, February 24, 1911; ratified by the President March 2, 1911; ratified by Japan March 31, 1911; ratifications exchanged at Tokyo April 4, 1911; proclaimed April 5, 1911.]

The President of the United States of America and His Majesty the Emperor of Japan, being desirous to strengthen the relations of amity and good understanding which happily exist between the two nations, and believing that the fixation in a manner clear and positive of the rules which are hereafter to govern the commercial intercourse between their respective countries will contribute to the realization of this most desirable result, have resolved to conclude a Treaty of Commerce and Navigation for that purpose, and to that end have named their Plenipotentiaries, that is to say:

The President of the United States of America, Philander C. Knox, Secretary of State of the United States; and

His Majesty the Emperor of Japan, Baron Yasuya Uchida, Jusammi, Grand Cordon of the Imperial Order of the Rising Sun, His Majesty's Ambassador Extraordinary and Plenipotentiary to the United States of America;

Who, after having communicated to each other their respective full powers, found to be in good and due form, have agreed upon the following articles:

ARTICLE I.

The citizens or subjects of each of the High Contracting Parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established.

They shall not be compelled, under any pretext whatever, to pay any charges or taxes other or higher than those that are or may be paid by native citizens or subjects.

The citizens or subjects of each of the High Contracting Parties shall receive, in the territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects, on their submitting themselves to the conditions imposed upon the native citizens or subjects.

They shall, however, be exempt in the territories of the other from compulsory military service either on land or sea, in the regular forces, or in the national guard, or in the militia; from all contributions imposed in lieu of personal service, and from all forced loans or military exactions or contributions.

ARTICLE II.

The dwellings, warehouses, manufactories and shops of the citizens or subjects of each of the High

Contracting Parties in the territories of the other, and all premises appertaining thereto used for purposes of residence or commerce, shall be respected. It shall not be allowable to proceed to make a domiciliary visit to, or a search of, any such buildings and premises, or to examine or inspect books, papers or accounts, except under the conditions and with the forms prescribed by the laws, ordinances and regulations for nationals.

ARTICLE III.

Each of the High Contracting Parties may appoint Consuls General, Consuls, Vice Consuls, Deputy Consuls and Consular Agents in all ports, cities and places of the other, except in those where it may not be convenient to recognize such officers. This exception, however, shall not be made in regard to one of the Contracting Parties without being made likewise in regard to all other Powers.

Such Consuls General, Consuls, Vice Consuls, Deputy Consuls and Consular Agents, having received exequaturs or other sufficient authorizations from the Government of the country to which they are appointed, shall, on condition of reciprocity, have the right to exercise the functions and to enjoy the exemptions and immunities which are or may hereafter be granted to the consular officers of the same rank of the most favored nation. The Government issuing exequaturs or other authorizations may in its discretion cancel the same on communicating the reasons for which it thought proper to do so.

ARTICLE IV.

There shall be between the territories of the two High Contracting Parties reciprocal freedom of

commerce and navigation. The citizens or subjects of each of the Contracting Parties, equally with the citizens or subjects of the most favored nation, shall have liberty freely to come with their ships and cargoes to all places, ports and rivers in the territories of the other which are or may be opened to foreign commerce, subject always to the laws of the country to which they thus come.

ARTICLE V.

The import duties on articles, the produce or manufacture of the territories of one of the High Contracting Parties, upon importation into the territories of the other, shall henceforth be regulated either by treaty between the two countries or by the internal legislation of each.

Neither Contracting Party shall impose any other or higher duties or charges on the exportation of any article to the territories of the other than are or may be payable on the exportation of the like article to any other foreign country.

Nor shall any prohibition be imposed by either country on the importation or exportation of any article from or to the territories of the other which shall not equally extend to the like article imported from or exported to any other country. The last provision is not, however, applicable to prohibitions or restrictions maintained or imposed as sanitary measures or for purposes of protecting animals and useful plants.

ARTICLE VI.

The citizens or subjects of each of the High Contracting Parties shall enjoy in the territories of the other exemption from all transit duties and a perfect

equality of treatment with native citizens or subjects in all that relates to warehousing, bounties, facilities and drawbacks.

ARTICLE VII.

Limited-liability and other companies and associations, commercial, industrial, and financial, already or hereafter to be organized in accordance with the laws of either High Contracting Party and domiciled in the territories of such Party, are authorized, in the territories of the other, to exercise their rights and appear in the courts either as plaintiffs or defendants, subject to the laws of such other Party.

The foregoing stipulation has no bearing upon the question whether a company or association organized in one of the two countries will or will not be permitted to transact its business or industry in the other, this permission remaining always subject to the laws and regulations enacted or established in the respective countries or in any part thereof.

ARTICLE VIII.

All articles which are or may be legally imported into the ports of either High Contracting Party from foreign countries in national vessels may likewise be imported into those ports in vessels of the other Contracting Party, without being liable to any other or higher duties or charges of whatever denomination than if such articles were imported in national vessels. Such reciprocal equality of treatment shall take effect without distinction, whether such articles come directly from the place of origin or from any other foreign place.

In the same manner, there shall be perfect equal-

ity of treatment in regard to exportation, so that the same export duties shall be paid, and the same bounties and drawbacks allowed, in the territories of each of the Contracting Parties on the exportation of any article which is or may be legally exported therefrom, whether such exportation shall take place in vessels of the United States or in Japanese vessels, and whatever may be the place of destination, whether a port of the other Party or of any third Power.

ARTICLE IX.

In all that regards the stationing, loading and unloading of vessels in the ports of the territories of the High Contracting Parties, no privileges shall be granted by either Party to national vessels which are not equally, in like cases, granted to the vessels of the other country; the intention of the Contracting Parties being that in these respects the respective vessels shall be treated on the footing of perfect equality.

ARTICLE X.

Merchant vessels navigating under the flag of the United States or that of Japan and carrying the papers required by their national laws to prove their nationality shall in Japan and in the United States be deemed to be vessels of the United States or of Japan, respectively.

ARTICLE XI.

No duties of tonnage, harbor, pilotage, lighthouse, quarantine, or other similar or corresponding duties of whatever denomination, levied in the name or for the profit of Government, public functionaries, pri-

vate individuals, corporations or establishments of any kind shall be imposed in the ports of the territories of either country upon the vessels of the other, which shall not equally, under the same conditions, be imposed on national vessels in general, or on vessels of the most favored nation. Such equality of treatment shall apply reciprocally to the respective vessels from whatever place they may arrive and whatever may be their place of destination.

ARTICLE XII.

Vessels charged with performance of regular scheduled postal service of one of the High Contracting Parties, whether belonging to the State or subsidized by it for the purpose, shall enjoy, in the ports of the territories of the other, the same facilities, privileges and immunities as are granted to like vessels of the most favored nation.

ARTICLE XIII.

The coasting trade of the High Contracting Parties is excepted from the provisions of the present Treaty and shall be regulated according to the laws of the United States and Japan, respectively. It is, however, understood that the citizens or subjects of either Contracting Party shall enjoy in this respect most-favored-nation treatment in the territories of the other.

A vessel of one of the Contracting Parties, laden in a foreign country with cargo destined for two or more ports of entry in the territories of the other, may discharge a portion of her cargo at one of the said ports, and, continuing her voyage to the other port or ports of destination, there discharge the re-

mainder of her cargo, subject always to the laws, tariffs and customs regulations of the country of destination and, in like manner and under the same reservation, the vessels of one of the Contracting Parties shall be permitted to load at several ports of the other for the same outward voyages.

ARTICLE XIV.

Except as otherwise expressly provided in this Treaty, the High Contracting Parties agree that, in all that concerns commerce and navigation, any privilege, favor or immunity which either Contracting Party has actually granted, or may hereafter grant, to the citizens or subjects of any other State shall be extended to the citizens or subjects of the other Contracting Party gratuitously, if the concession in favor of that other State shall have been gratuitous, and on the same or equivalent conditions, if the concession shall have been conditional.

ARTICLE XV.

The citizens or subjects of each of the High Contracting Parties shall enjoy in the territories of the other the same protection as native citizens or subjects in regard to patents, trade-marks and designs, upon fulfillment of the formalities prescribed by law.

ARTICLE XVI.

The present Treaty shall, from the date on which it enters into operation, supersede the Treaty of Commerce and Navigation dated the 22nd day of November, 1894; and from the same date the last-named Treaty shall cease to be binding.

ARTICLE XVII.

The present Treaty shall enter into operation on the 17th of July, 1911, and shall remain in force twelve years or until the expiration of six months from the date on which either of the Contracting Parties shall have given notice to the other of its intention to terminate the Treaty.

In case neither of the Contracting Parties shall have given notice to the other six months before the expiration of the said period of twelve years of its intention to terminate the Treaty, it shall continue operative until the expiration of six months from the date on which either Party shall have given such notice.

ARTICLE XVIII.

The present Treaty shall be ratified and the ratifications thereof shall be exchanged at Tokyo as soon as possible and not later than three months from the present date.

In witness whereof, the respective Plenipotentiaries have signed this Treaty in duplicate and have hereunto affixed their seals.

Done at Washington the 21st day of February, in the nineteen hundred and eleventh year of the Christian era, corresponding to the 21st day of the 2nd month of the 44th year of Meiji.

PHILANDER C. KNOX. (Seal)
Y. UCHIDA. (Seal)

And whereas, the advice and consent of the Senate of the United States to the ratification of the said Treaty was given with the understanding "that the treaty shall not be deemed to repeal or affect any

of the provisions of the Act of Congress entitled 'An Act to Regulate the Immigration of Aliens into the United States,' approved February 20th, 1927";

And whereas, the said understanding has been accepted by the Government of Japan;

And whereas, the said Treaty, as amended by the Senate of the United States, has been duly ratified on both parts, and the ratifications of the two Governments were exchanged in the City of Tokyo, on the fourth day of April, one thousand nine hundred and eleven;

Now, therefore, be it known that I, WILLIAM HOWARD TAFT, President of the United States of America, have caused the said Treaty, as amended, and the said understanding to be made public, to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States and the citizens thereof.

In testimony whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this fifth day of April in the year of our Lord one thousand nine hundred and eleven, and of the Independence of the United States of America the one hundred and thirty-fifth.

(Seal) WM. H. TAFT.

By the President:

P. C. KNOX, Secretary of State.

DECLARATION.

In proceeding this day to the signature of the Treaty of Commerce and Navigation between Japan and the United States the undersigned, Japanese Ambassador in Washington, duly authorized by his

Government, has the honor to declare that the Imperial Japanese Government are fully prepared to maintain with equal effectiveness the limitation and control which they have for the past three years exercised in regulation of the emigration of laborers to the United States.

Y. UCHIDA.

February 21, 1911.

By the President of the United States of America.

A PROCLAMATION.

Whereas a Protocol of a provisional tariff arrangement between the United States of America and the Empire of Japan was concluded and signed by their respective Plenipotentiaries at Washington, on the twenty-first day of February, one thousand nine hundred and eleven, the original of which Protocol, being in the English language, is, as amended by the Senate of the United States, word for word as follows:

PROTOCOL.

The Government of the United States of America and the Government of Japan have, through their respective Plenipotentiaries, agreed upon the following stipulation in regard to Article V of the Treaty of Commerce and Navigation between the United States and Japan signed this day to replace on the 17th of July, 1911, the Treaty of the 22nd of November, 1894:

Pending the conclusion of a treaty relating to tariff, the provisions relating to tariff in the Treaty of the 22nd of November, 1894, shall be maintained.

In witness whereof, the respective Plenipoten-

tiaries have signed this Protocol in duplicate and have hereunto affixed their seals.

Done at Washington the 21st day of February, in the nineteen hundred and eleventh year of the Christian era, corresponding to the 21st day of the 2nd month of the 44th year of Meiji.

(Seal) PHILANDER C. KNOX.
(Seal) Y. UCHIDA.

And whereas, the said Protocol, as amended by the Senate of the United States, has been duly ratified on both parts, and the ratifications of the two governments were exchanged in the City of Tokyo, on the fourth day of April, one thousand nine hundred and eleven;

Now, therefore, be it known that I, William Howard Taft, President of the United States of America, have caused the said Protocol to be made public, to the end that the same and every article and clause thereof, as amended, may be observed and fulfilled with good faith by the United States and the citizens thereof.

In testimony whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this fifth day of April in the year of our Lord one thousand nine hundred and eleven, and of the Independence of the United States of America the one hundred and thirty-fifth.

WM. H. TAFT.

(Seal)

By the President:
P. C. KNOX, Secretary of State.

APPENDIX B.

An act relating to the rights, powers and disabilities of aliens and of certain companies, associations and corporations with respect to property in this state, providing for escheats in certain cases, prescribing the procedure therein, requiring reports of certain property holders to facilitate the enforcement of this act, prescribing penalties for violation of the provisions hereof, and repealing all acts or parts of acts inconsistent or in conflict herewith.

[Submitted by the initiative and approved by electors November 2, 1920. Stats. 1921, p. lxxxiii. In effect December 9, 1920.]

The people of the State of California do enact as follows:

Section 1. All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, use, cultivate, occupy, transfer, transmit and inherit real property, or any interest therein, in this state, and have in whole or in part the beneficial use thereof, in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this state. [Amended 1923. Stats. 1923, p. 1021.]

Sec. 2. All aliens other than those mentioned in section one of this act may acquire, possess, enjoy, use, cultivate, occupy and transfer real property, or any interest therein, in this state, and have in whole or in part the beneficial use thereof, in the manner and to the extent, and for the purposes prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject,

and not otherwise. [Amended 1923. Stats. 1923, p. 1021.]

Sec. 3. Any company, association or corporation organized under the laws of this or any other state or nation, of which a majority of the members are aliens other than those specified in section one of this act, or in which a majority of the issued capital stock is owned by such aliens, may acquire, possess, enjoy, use, cultivate, occupy and transfer real property, or any interest therein, in this state, and have in whole or in part the beneficial use thereof, in the manner and to the extent and for the purposes prescribed by any treaty now existing between the government of the United States and the nation or country of which such members or stockholders are citizens or subjects, and not otherwise. Hereafter all aliens other than those specified in section one hereof may become members of or acquire shares of stock in any company, association or corporation that is or may be authorized to acquire, possess, enjoy, use, cultivate, occupy and transfer real property, or any interest therein, in this state, in the manner and to the extent and for the purposes prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise. [Amended 1923. Stats. 1923, p. 1021.]

Sec. 4. Hereafter no alien mentioned in section two hereof and no company, association or corporation mentioned in section three hereof, may be appointed guardian of that portion of the estate of a minor which consists of property which such alien is inhibited from acquiring, possessing, enjoying, using, cultivating, occupying, transferring, transmit-

ting or inheriting, or which such company, association or corporation is inhibited from acquiring, possessing, enjoying, using, cultivating, occupying or transferring, by reason of the provisions of this act. The public administrator of the proper county, or any other competent person or corporation, may be appointed guardian of the estate of a minor citizen whose parents are ineligible to appointment under the provisions of this section.

On such notice to the guardian as the court may require, the superior court may remove the guardian of such an estate whenever it appears to the satisfaction of the court:

(*a*) That the guardian has failed to file the report required by the provisions of section five hereof; or

(*b*) That the property of the ward has not been or is not being administered with due regard to the primary interest of the ward; or

(*c*) That facts exist which would make the guardian ineligible to appointment in the first instance; or

(*d*) That facts establishing any other legal ground for removal exist. [Amended 1923, Stats. 1923, p. 1021.]

Sec. 5. (*a*) The term "trustee" as used in this section means any person, company, association or corporation that as guardian, trustee, attorney in fact or agent, or in any other capacity has the title, custody or control of property, or some interest therein, belonging to an alien mentioned in section two hereof, or to the minor child of such an alien, if the property is of such a character that such alien is inhibited from acquiring, possessing, enjoying, using, cultivating, occupying, transferring, transmitting or inheriting it.

(*b*) Annually on or before the thirty-first day of January every such trustee must file in the office of the secretary of state of California and in the office of the county clerk of each county in which any of the property is situated, a verified written report showing:

(1) The property, real or personal, held by him for or on behalf of such alien or minor;

(2) A statement showing the date when each item of such property came into his possession or control;

(3) An itemized account of all such expenditures, investments, rents, issues and profits in respect to the administration and control of such property with particular reference to holdings of corporate stock and leases, cropping contracts and other agreements in respect to land and the handling or sale of products thereof.

(*c*) Any person, company, association or corporation that violates any provision of this section is guilty of a misdemeanor and shall be punished by a fine not exceeding one thousand dollars or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment.

(*d*) The provisions of this section are cumulative and are not intended to change the jurisdiction or the rules of practice of courts of justice. [Amended 1923, Stats. 1923, p. 1022.]

Sec. 6. Whenever it appears to the court in any probate proceeding that by reason of the provisions of this act any heir or devisee can not take real property in this state or membership or shares of stock in a company, association or corporation which, but for said provisions, said heir or devisee would take as such, the court, instead of ordering

a distribution of such property to such heir or devisee, shall order a sale of said property to be made in the manner provided by law for probate sales of property and the proceeds of such sale shall be distributed to such heir or devisee in lieu of such property.

Sec. 7. Any real property hereafter acquired in fee in violation of the provisions of this act by any alien mentioned in section two of this act, or by any company, association or corporation mentioned in section three of this act, shall escheat as of the date of such acquiring, to, and become and remain the property of the State of California. The attorney general or district attorney of the proper county shall institute proceedings to have the escheat of such real property adjudged and enforced in the manner provided by section four hundred seventy-four of the Political Code and title eight, part three of the Code of Civil Procedure. Upon the entry of final judgment in such proceedings, the title to such real property shall pass to the State of California, as of the date of such acquisition in violation of the provisions of this act. The provisions of this section and of sections two and three of this act shall not apply to any real property hereafter acquired in the enforcement or in satisfaction of any lien now existing upon or interest in such property so long as such real property so acquired shall remain the property of the alien, company, association or corporation acquiring the same in such manner. No alien, company, association or corporation mentioned in section two or section three hereof shall hold for a longer period than two years the possession of any agricultural land acquired in the enforcement of or in satisfaction of

a mortgage or other lien hereafter made or acquired in good faith to secure a debt. [Amended 1923. Stats. 1923, p. 1023.]

Sec. 8. Any leasehold or other interest in real property less than the fee, including cropping contracts which are hereby declared to constitute an interest in real property less than the fee, hereafter acquired in violation of the provisions of this act by any alien mentioned in section two of this act, or by any company, association or corporation mentioned in section three of this act, shall escheat to the State of California, as of the date of such acquiring in violation of the provisions of this act. The attorney general or district attorney of the proper county shall institute proceedings to have such escheat adjudged and enforced in the same manner as is provided in section seven of this act. In such proceedings the court shall determine and adjudge the value of such leasehold or other interest in such real property, as of the date of such acquisition in violation of the provisions of this act, and enter judgment for the state for the amount thereof together with costs. The said judgment so entered shall be considered a lien against the real property in which such leasehold or other interest less than the fee is so acquired in violation of the provisions of this act, which lien shall exist as of the date of such unlawful acquisition. Thereupon the court shall order a sale of the real property covered by such leasehold, or other interest, in the manner provided by section one thousand two hundred seventy-one of the Code of Civil Procedure. Out of the proceeds arising from such sale, the amount of the judgment rendered for the state shall be paid into the state treasury and the

balance shall be deposited with and distributed by the court in accordance with the interest of the parties therein. Any share of stock or the interest of any member in a company, association or corporation hereafter acquired in violation of the provisions of section three of this act shall escheat to the State of California as of the date of such acquiring in violation of the provisions of said section three of this act, and it is hereby declared that any such share of stock or the interest of any member in such company, association or corporation so acquired in violation of the provisions of section three of this act is an interest in real property. Such escheat shall be adjudged and enforced in the same manner as is provided in this section for the escheat of a leasehold or other interest in real property less than the fee. [Amended 1923. Stats. 1923, p. 1023.]

Sec. 9. Every transfer of real property, or of an interest therein, though colorable in form, shall be void as to the state and the interest thereby conveyed or sought to be conveyed shall escheat to the state as of the date of such transfer, if the property interest involved is of such a character that an alien mentioned in section two hereof is inhibited from acquiring, possessing, enjoying, using, cultivating, occupying, transferring, transmitting or inheriting it, and if the conveyance is made with intent to prevent, evade or avoid escheat as provided for herein.

A prima facie presumption that the conveyance is made with such intent shall arise upon proof of any of the following group of facts:

(*a*) The taking of the property in the name of a person other than the persons mentioned in section two hereof if the consideration is paid or agreed or

understood to be paid by an alien mentioned in section two hereof;

(*b*) The taking of the property in the name of a company, association or corporation if the memberships or shares of stock therein held by aliens mentioned in section two hereof, together with the memberships or shares of stock held by others but paid for or agreed or understood to be paid for by such aliens, would amount to a majority of the membership or issued capital stock of such company, association or corporation;

(*c*) The execution of a mortgage in favor of an alien mentioned in section two hereof if such mortgagee is given possession, control or management of the property.

The enumeration in this section of certain presumptions shall not be so construed as to preclude other presumptions or inferences that reasonably may be made as to the existence of intent to prevent, evade or avoid escheat as provided for herein. [Amended 1923. Stats. 1923, p. 1024.]

Sec. 10. If two or more persons conspire to violate any of the provisions of this act they are punishable by imprisonment in the county jail or state penitentiary not exceeding two years or by a fine not exceeding five thousand dollars or both. [Amended 1923. Stats. 1923, p. 1024.]

Sec. 11. Nothing in this act shall be construed as a limitation upon the power of the state to enact laws with respect to the acquisition, possession, enjoyment, use, cultivation, occupation, transferring, transmitting or inheriting by aliens of real property in this state. [Amended 1923. Stats. 1923, p. 1025.]

Sec. 12. All acts and parts of acts inconsistent

or in conflict with the provisions hereof are hereby repealed; *provided*, that—

(*a*) This act shall not affect pending actions or proceedings, but the same may be prosecuted and defended with the same effect as if this act had not been adopted;

(*b*) No cause of action arising under any law of this state shall be affected by reason of the adoption of this act whether an action or proceeding has been instituted thereon at the time of the taking effect of this act or not and actions may be brought upon such causes in the same manner, under the same terms and conditions, and with the same effect as if this act had not been adopted;

(*c*) This act in so far as it does not add to, take from or alter an existing law, shall be construed as a continuation thereof.

Sec. 13. The legislature may amend this act in furtherance of its purpose and to facilitate its operation.

Sec. 14. If any section, subsection, sentence, clause or phrase of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act. The people hereby declare that they would have passed this act, and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more other sections, subsections, sentences, clauses or phrases be declared unconstitutional.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1927.

No. 13

Frank C. Jordan, Secretary of State, and Robert V. Jordan, Deputy Secretary of State,

Petitioners,

vs.

K. Tashiro, M. L.; Sanai Ishiyama, M. D.; Paul K. Ito, M. D.; Y. Kasai, and F. T. Nakaya, M. D.,

Respondents.

Answer to Petition for Writ of Certiorari.

J. MARION WRIGHT,
Attorney for Respondents.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1927.

No. 449.

Frank C. Jordan, Secretary of State, and Robert V. Jordan, Deputy Secretary of State,

Petitioners,

vs.

K. Tashiro, M. D.; Isami Sekiyama, M. D.; Paul K. Ito, M. D.; Y. Karaki, and F. T. Nakaya, M. D.,

Respondents.

Answer to Petition for Writ of Certiorari.

To the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Come now respondents herein, and this Honorable Court having on April 13, 1928, made its order allowing respondents to file their answer to the petition for writ of certiorari, respectfully file this their answer to said writ, and say:

That the petition for writ of certiorari should not be granted or allowed, and that a writ should not issue for the following reasons:

First: That the only question involved is whether or not the construction by the Supreme Court of the state of California of a state statute, viz.: (Alien Land Law of California, Stats. of California, 1923, p. 1020) was correct, construing same in connection with the treaty between the United States and Japan, being the Treaty of Commerce and Navigation, proclaimed April 5, 1911 (37 U. S. Stats. at large, p. 1504), to which treaty the Alien Land Act refers;

Second: There is no federal question involved, nor any question of the validity of a state statute or law on the ground of its being repugnant to the Constitution, treaty or law of the United States, nor any right or privilege claimed or set up under the Constitution, or a treaty of the United States.

Respondents admit that the petition presented to the Supreme Court of the state of California for a writ of mandamus to compel petitioners to file certain articles of incorporation offered by respondents, contained a statement, among other things, that respondents had the right to incorporate in the United States under the laws of the state of California by reason of the provisions in the Treaty of Commerce and Navigation between the government of the United States and the Empire of Japan, above referred to.

The decision of the Supreme Court of California complained of by petitioners (Tashiro *et al.* v. Jordan *et al.*, 73 Cal. Dec. 635) is a decision construing a state law,

viz.: the Alien Land Act above referred to, and the provisions of same applicable are as follows:

Cal. Stats. 1923, page 1020, section 2:

> "All aliens other than those mentioned in section one of this act may acquire, possess, enjoy, use, cultivate, occupy and transfer real property or any interest therein, in this state, and have in whole or in part the beneficial use thereof, in the manner and to the extent, and for the purposes prescribed by any treaty now existing between the government of the United States, and the nation or country of which such alien is a citizen or subject, and not otherwise."

The above provision of the Alien Land Act prohibits respondents from doing certain things except as permitted by the treaty existing between the United States and the Empire of Japan (37 U. S. Stats. at large, p. 1504). Necessarily, the Supreme Court of California had to go to said treaty to see what respondents were permitted to do as the Alien Land Act, instead of providing specifically what could be done by respondents, referred to the treaty then in existence.

All the Supreme Court of California did was to construe the Alien Land Act in connection with said treaty. If the Alien Land Act had contained section 2 of the treaty as part of the act, then of course it could not be claimed there was even any reference to a treaty involved, but the act itself provides that the respondents can only do certain things, and have certain privileges which are permitted under the treaty. The provision of the treaty applicable is Article I of the Treaty of Commerce and Navigation, proclaimed April 5, 1911 (37 U. S. Stats. at large, p. 1504) as follows:

> "The citizens or subjects of each of the high contracting parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established."

The decision complained of (73 Cal. Dec. 635) did not hold that the treaty was invalid, or in conflict with the state law, or the Alien Land Act, but only held that the said Alien Land Act of California by reference to said treaty, gave the respondents the right to form a corporation which petitioners refused to allow them to do.

The decision is purely a question of construction of a state law by a state court. Petitioners seek to invoke the jurisdiction of this court under that part of paragraph b of section 344, Title 28 U. S. C. which provides among other things:

> "• • • Where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authorities exercised under, the United States; • • •"

We believe this provision has reference to a right or privilege claimed under a treaty which right or privilege is in conflict with a state law. The Alien Land Act does not conflict with the treaty or legislate contrary thereto, but instead recognizes the treaty and says that under the Alien Land Act respondents may do everything permitted by the treaty, but nothing more; so we say

that the jurisdiction of this court cannot be invoked under the above section.

It is not claimed that either the Alien Land Act or the treaty are invalid, and the law is well settled that where a statute is admitted to be valid, and the only question is whether it has been correctly construed by the state court, the Supreme Court of the United States has no jurisdiction.

> Commercial Bank v. Buckingham, 5 How. 317, 12 L. Ed. 169;
>
> Scott v. Jones, 5 How. 343, 12 L. Ed. 181;
>
> Smith v. Hunter, 7 How. 738, 12 L. Ed. 894;
>
> Lessieur v. Price, 12 How. 59, 13 L. Ed. 893;
>
> Congdon, etc. Min. Co. v. Goodman, 2 Black 574, 17 L. Ed. 257.

Where the decree of the state court turns upon its construction of a state statute, and not upon its constitutionality, this court will not take jurisdiction. It is the peculiar province of the state court to construe statutes of its own state.

> Commercial Bank v. Buckingham, 5 How. 317, 12 L. Ed. 169.

A decision of a state court resting upon the *construction and not* upon the validity of the statute of the state, does *not* present a federal question.

> Grand Gulf R. etc. Co. v. Marshall, 12 How. 165, 13 L. Ed. 938;
>
> Ferry v. King County, 141 U. S. 668, 12 S. Ct. 128, 35 L. Ed. 895;
>
> Snell v. Chicago, 152 U. S. 191, 14 S. Ct. 489, 13 L. Ed. 408.

In the exercise of appellate jurisdiction of the Federal Supreme Court over state courts, the former court is bound by the construction of a state law, adopted by its court of last resort.

The scope and effect of a state statute or law is purely a question of state law, and therefore the decision relating only to such subject involves no federal question.

Kenny v. Craven, 215 U. S. 125, 30 S. Ct. 64, 54 L. Ed. 122.

The Supreme Court of the United States is without jurisdiction to review and revise the construction affixed to a state statute as to a state matter by the court of last resort of the state.

Quong Ham Wah Co. v. Industrial Commission (Cal. 1921), 255 U. S. 445, 448, 41 S. Ct. 373, 65 L. Ed. 723, and cases cited;

Terrace v. Thompson (Wash. 1923) 263 U. S. 197, 44 S. Ct. 15, 68 L. Ed. 255 affirming (1921) 274 Fed. 841.

The construction given a state statute by the highest court of the state will, as a general rule, be followed by the Supreme Court of the United States in determining its jurisdiction to consider a case on the ground that a federal right is involved.

Baccus v. Louisiana, 232 U. S. 334, 34 S. Ct. 439, 58 L. Ed. 627.

The record here does not show that a federal question was raised or decided adversely, and this must appear to give the court jurisdiction.

Inglee v. Coolidge, 15 U. S. (2 Wheat) 363;

Miller v. Nichols, 17 U. S. (4 Wheat) 311;

Williams v. Norris, 25 U. S. (12 Wheat) 117;
Fisher v. Cockrell, 5 Pet. 248, 8 L. Ed. 114;
Seaboard Airline Ry. Co. v. Duvall, 225 U. S. 477, 32 S. Ct. 790, 56 L. Ed. 1171;
Carstairs v. Cochran, 193 U. S. 10.

Respondents therefore say that the jurisdiction of this court should not be invoked under section 344, Title 28, U. S. C.; that no federal question is involved; that no right or privilege is claimed or set up under the Constitution or a treaty of the United States. That no question of a conflict between the treaty and a state law is involved, and no attack is made either upon the treaty or the Alien Land Act, but that the sole question involved is a question of the construction of a state law, viz.: the Alien Land Act, by the highest court of the state of California, referring as the court necessarily must in the construction of said Alien Land Act, to the treaty above referred to. By the Alien Land Act itself it is necessary to go to the treaty to see what rights are given respondents.

Respondents deny that upon a hearing of the matter, the Supreme Court of the state of California rendered its decision holding that pursuant to the treaty, the respondents were entitled to the relief prayed for, but allege that the State Supreme Court rendered its decision that respondents were entitled to the relief prayed for under the terms and provisions of the Alien Land Act, with reference to said treaty.

Respondents further deny that the decision of the State Supreme Court sustained any federal claims specifically set up in the petition for writ of mandamus, and deny that any federal claims were specifically, or at all, set up in said petition for writ of mandamus.

Respondents allege that it is immaterial whether or not this court has never held that the conduct of a hospital for profit is a commercial purpose under article 1 of the treaty, or whether incorporating is incident to or necessary for trade, within the intendment of said Article 1, as such matters are matters to be decided upon by the Supreme Court of the state of California, under the provisions of the Alien Land Act.

Reference is made to respondents' brief entitled "Brief of Defendants in Error" and the supplement entitled "Supplement to Brief of Defendants in Error" which have been already filed in this action.

Respondents therefore respectfully pray that the petition for writ of certiorari be denied, and that petitioners take nothing by their petition.

Respectfully submitted,

J. Marion Wright,
Attorney for Respondents.

State of California, County of Los Angeles—ss.

Isami Sekiyama, being first duly sworn, says: that he is one of the respondents in the above named proceeding; that he has heard read the foregoing answer to petition for writ of certiorari, and knows the contents thereof, and that the facts therein stated are true to the best of his knowledge, information and belief.

Isami Sekiyama.

Subscribed and sworn to before me this 30th day of April, 1928.

J. M. Clark,
Notary Public in and for the County of Los Angeles, State of California.

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1938.

No. [redacted] 11

Frank S. Jordan, Secretary of State, and Robert T. Jordan, Deputy Secretary of State,

Plaintiffs in Error,

vs.

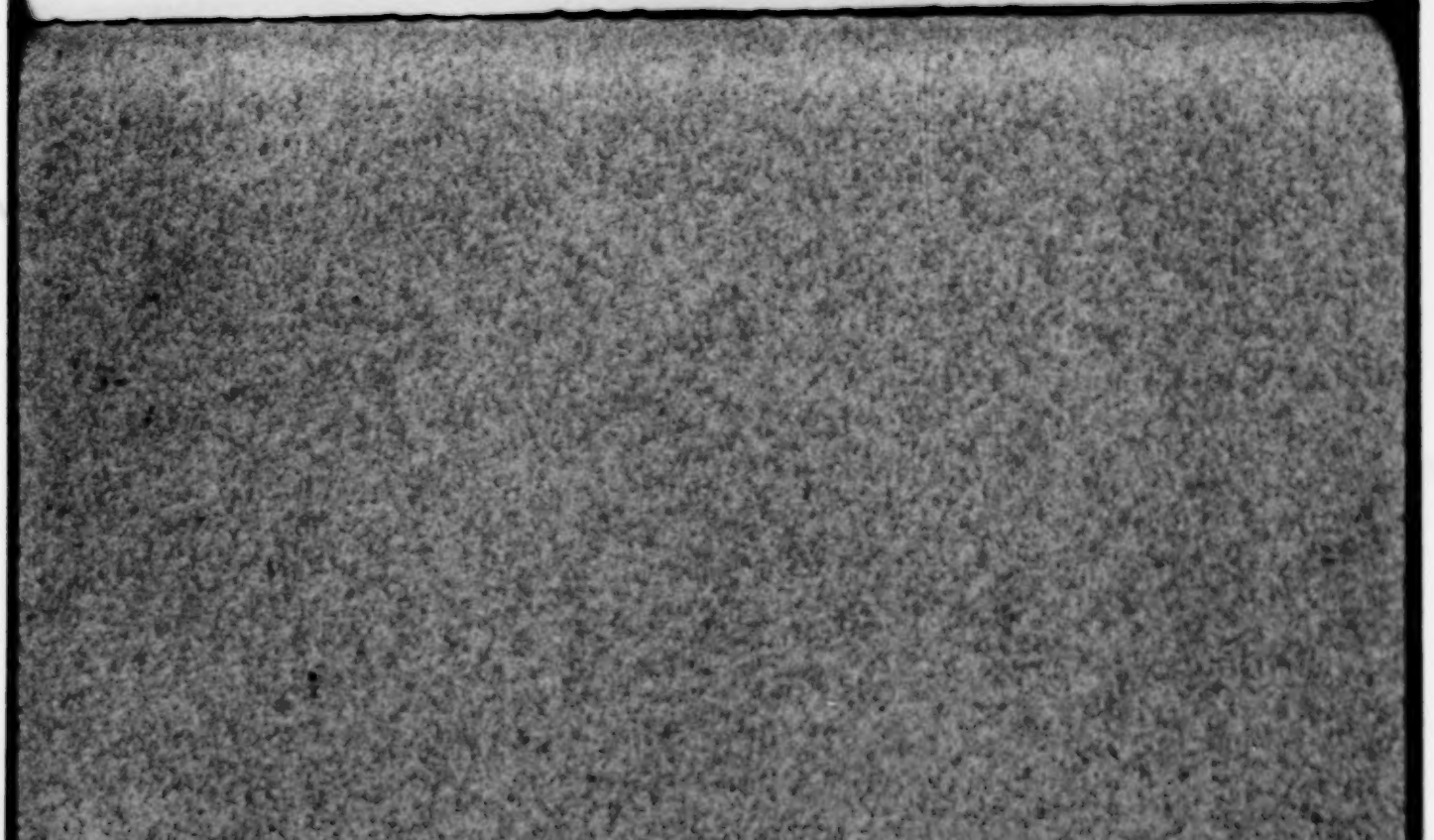
E. Tedder, M.D.; Leon Gillespie, M.D.; Paul E. Iler, M.D., et al.,

Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR

J. Mason Warren,

Attorney for Defendants in Error.



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IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1927.

No. 449.

Frank C. Jordan, Secretary of State, and Robert V. Jordan, Deputy Secretary of State,

Plaintiffs in Error,

vs.

K. Tashiro, M.D.; Isami Sekiyama, M.D.; Paul K. Ito, M.D., et al.,

Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR.

Plaintiffs in error in their statement of the case have correctly set forth the nature of the action and the proceedings before the Supreme Court of California and the decision of that court. It is therefore unnecessary for defendants in error to make a statement of the case.

ARGUMENT.

Plaintiffs in error urge four points as follows:

First: The use of land for the purpose of erecting and maintaining a hospital thereon is not the use of land

for "commercial purposes" within the intendment of Article I of the Treaty of Commerce and Navigation between the Government of the United States and the Empire of Japan proclaimed April 5, 1911.

Second: The Treaty of Commerce and Navigation between the Government of the United States and the Empire of Japan proclaimed April 5, 1911, "does not give or secure to any corporation, domestic or foreign, the right to transact business in the United States or in any state or territory thereof, or to acquire, possess, enjoy, use, cultivate, occupy or transfer real property or any interest therein in the United States or in any state or territory thereof or to acquire, possess, enjoy, use, cultivate, occupy or transfer real property or any interest therein in the United States or in any state or territory thereof.

Third: That the Treaty of Commerce and Navigation between the Government of the United States and the Empire of Japan proclaimed April 5, 1911, does not give or secure to the citizens and subjects of the Empire of Japan the right to form a corporation in the United States or in any state or territory thereof, nor does such treaty give or secure to such persons the right to become members of or acquire shares of stock in any corporation which either is or is not authorized to acquire, possess, enjoy, use, cultivate, occupy or transfer real property or any interest therein in the United States or in any state or territory thereof.

Fourth: By reason of the facts stated in the two points next preceding, viz., second and third, section 3 of the Alien Land Law of the state of California prohibits citizens and subjects of the Empire of Japan from becom-

ing members of or acquire shares of stock in a corporation authorized to acquire, possess, enjoy, use, cultivate, occupy or transfer real property or any interest therein in the state of California, and prohibits any corporation of which a majority of its members are citizens or subjects of the Empire of Japan or in which a majority of the issued capital stock is owned by such persons from acquiring, possessing, enjoying, using, cultivating, occupying or transferring real property or any interest therein in the state of California.

While these points are worded somewhat differently, still the construction of the treaty between the United States and the Empire of Japan, known as the Treaty of Commerce and Navigation proclaimed April 5, 1911, and set forth in Appendix "A" of this brief, will determine all of these four points. In other words, if a broad and liberal construction is placed upon this treaty as was done by the Supreme Court of the state of California in its opinion filed May 20, 1927 [R. p. 10, fol. 58, 73 Cal. Dec. 635], then defendants in error had a right to incorporate and the judgment of the Supreme Court of California should be affirmed. Plaintiffs in error in all of their contentions, while stating the general rules as to treaty construction, insist that in this case, a narrow or strict construction should be placed upon the treaty restricting the rights of the defendants in error to the *wording* of the treaty *rather than to its intent*.

We will now take up Article I of the Treaty in question.

Article I of Treaty.

Article I of the treaty in question (Appendix "A") provides as follows:

> "The citizens or subjects of each of the High Contracting Parties shall have the liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, *to lease land for residential and commercial purposes, and generally do anything incident to or necessary for trade upon the same terms as native citizens or subjects*, submitting themselves to the laws and regulations there established." (Italics ours.)

It is under this article of the treaty that defendants in error sought to incorporate and form a corporation, which corporation must necesarily, in order to transact business, lease land for its use. The corporation sought to be formed was for the purpose of operating and maintaining a hospital, and defendants in error maintain that the operation and conduct of a hospital is a commercial purpose and is permitted under Article I of the said treaty. They also contend that they have a right to form this corporation under the provision in Article I, which provides that citizens of Japan in the United States may do anything incident to, or necessary for, trade upon the same terms as native citizens or subjects. It is conceded by plaintiffs in error that under the provisions of Article I of the treaty, Japanese, individually or as a partnership, may lease land for residential or commercial purposes and may do anything incident to or necessary for trade upon the same terms as native citizens or subjects, but they contend that the operation, erection and conduct of a hospital is not a *commercial purpose*, and also that the provision in the treaty allowing the individual citizens of Japan to do anything incident to or necessary for trade upon the

same terms as native citizens or subjects, does not permit the formation of a corporation to operate, maintain or conduct a hospital; in fact does not permit the citizens of Japan in California or the United States to incorporate at all. Let us, therefore, see what construction should be placed upon the words "commercial purposes" and what construction should be placed upon the words "and generally do anything incident to or necessary for trade upon the same terms as native citizens or subjects."

Before proceeding with the canons of treaty construction, it might be well to note that there is no law in California preventing or prohibiting Japanese aliens, or any aliens ineligible to citizenship, from incorporating. The provisions of the laws of California relative to the formation of a corporation are found in section 285 of the Civil Code of California, as follows:

> "Section 285. PRIVATE CORPORATIONS, HOW FORMED. Private corporations may be formed by the voluntary association of three or more *persons* in the manner prescribed in this Article. A majority of such *persons* must be *residents* of this state." (Italics ours.)

It will be noted there are no restrictions requiring the persons desiring to form a corporation to be *citizens* of the state, but only that a majority of such persons must be *residents* of the state.

Section 286 of the Civil Code of California provides for what purposes corporations may be formed. It is as follows:

> "Section 286. FOR WHAT PURPOSE. Private corporations may be formed for any purpose *for which individuals may lawfully associate themselves.*" (Italics ours.)

This section provides that persons may incorporate for any lawful business that they might conduct individually and not as a corporation. Plaintiffs in error admit, and Article I of the treaty under discussion, *supra*, provides that Japanese citizens or subjects, whether eligible or ineligible to citizenship, may lease land for residential and commercial purposes, and do anything incident to or necessary for trade upon the same terms as native citizens or subjects, yet it is strenuously contended by plaintiffs in error that while these citizens or subjects, individually or as an unincorporated association or partnership, may lease land for commercial purposes or generally do anything incident to or necessary for trade upon the same terms as native citizens or subjects, they cannot form a corporation to do what they could do themselves. In other words, because the treaty does not say *in so many words that the citizens or subjects of Japan can form a corporation, and that the corporation can lease land for commercial purposes, and that a hospital is a commercial purpose*, that such corporation cannot be formed by these citizens or subjects, and that a hospital is not a commercial purpose.

Construction of Treaties, and This Treaty.

Let us see what the Supreme Court of California has said in construing *this very treaty*. The State of California v. Tojuero Tagami, *et al.*, 195 Cal. 522, was a case where the State of California brought an action to have an escheat declared and enforced as to a certain leasehold interest in certain lands. Defendant Supulveda owned the land and executed a lease to a Japanese named Tagami for a term of three years with certain options to renew for the express purpose of having the land occupied and improved

by the lessee for use as a health resort and sanitarium. Tagami entered into possession of the land and was using and occupying it for the purpose of a health resort and sanitarium. The State of California alleged that Tagami was holding the land in violation of the Alien Land Act of California and prayed for a decree that the leasehold estate be escheated and be sold in conformity with the laws of California. The trial court sustained the demurrer of defendants to the complaint on the ground that the same did not state a cause of action, and from the judgment entered in defendant's favor an appeal was taken. It was contended in that action that the leasehold under consideration, being for the purpose of maintaining and operating a *health resort and sanitarium*, was not one which was permitted under Article I of the Treaty of Commerce and Navigation with Japan (Appendix "A"), in that it was not a lease for residential or commercial purposes. The only question, therefore, to be determined by the trial court and by the Supreme Court of California in that case was the interpretation and construction to be given Article I of said treaty as well as the provisions, language and scope of the entire treaty. The court there said, page 527:

> "* * * Among these is the doctrine that treaties entered into between friendly powers are, as a general rule, to be given a liberal interpretation. This principle was given apt expression by Mr. Justice Field in the case of De Geofroy v. Riggs, 133 U. S. 258 (33 L. Ed. 642, 10 Sup. Ct. Rep. 295, see, also, Rose's U. S. Notes), wherein that learned justice says:
>
> "'It is a general principle of construction, with respect to treaties, that they shall be liberally construed, so as to carry out the apparent intention of the

parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction, words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended. And it has been held by this court that where a treaty admits of two constructions, one restrictive of rights that may be claimed under it, and the other favorable to them, the latter is to be preferred.'

"Looking to the treaty here under consideration, taken as a whole, it will be observed that its opening paragraphs expressly declare that it is to be a treaty between friendly powers, entered into with the mutual desire and purpose of strengthening 'the relations of amity and good understanding which happily exists between the two nations,' and having for its object, 'the fixation in a manner clear and positive of the rules which are hereafter to govern the commercial intercourse between their respective countries.' The treaty is termed 'A treaty of commerce and navigation' for the foregoing purposes. Its first article provides that:

"'The citizens or subjects of each of the high contracting parties shall receive, in the territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects, on their submitting themselves to the conditions imposed upon the native citizens or subjects.'

"In certain other clauses of said treaty the citizens or subjects of the respective contracting powers are to enjoy as to particular rights and privileges the equality accorded to native citizens or subjects and to

occupy the status of those of 'the most favored nation.' It would seem to be obvious that to such a treaty the foregoing principle as to liberality in its interpretation with a view to achieving its expressed purposes as above outlined should be adopted and applied. The opening sentence of the first article of the treaty as above quoted provides that, 'The citizens or subjects of each of the high contracting parties shall have the same liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail.' In order that the foregoing liberties and privileges may be exercised the citizens or subjects of the respective parties to the treaty are by the succeeding clause in said section accorded the right 'to own or lease and occupy houses, manufactories, warehouses and shops'; and are also permitted 'to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade.' The question in this case turns upon the meaning to be given to the term 'commercial purposes' as used in the foregoing clause of article I of said treaty. Looking to its immediate context in said article, this phrase would seem to be intimately linked up with the term 'trade,' as twice employed in said article in defining the liberties and activities of those persons, the citizens or subjects of each of the contracting parties, for whose benefit the treaty was made. (2) The words 'trade' and 'commerce' are frequently found in conjunction or juxtaposition in treaties between nations and in those constitutions and laws which define and regulate the scope and purposes of such international engagements. They are also often employed by lexicographers in defining each other. When so employed, and particularly when so used in the conjunctive, *they are held to impart to each other an enlarged signification which would include practically every business occupation*

carried on for the purpose of procuring subsistence or profit and into which, or any material part of which, the elements of bargain and sale, barter, exchange or traffic enter. Each of these terms has sometimes been subjected to two limitations which would distinguish them from unskilled labor and even from agricultural employments on the one hand and from professional employments and the exercise of the fine arts on the other. (See Standard Dictionary, 'Trade.') (3) Of these two phrases the terms 'commerce' and 'commercial' are usually given the larger signification as embracing those dealings in general which arise and are conducted in the course of business and social intercourse between individuals and peoples. (See Standard Dictionary, 'Commerce.') This enlarged signification was early in our national history imparted to the term 'commerce' by Chief Justice Marshall, in the leading case of Gibbons v. Ogden, 9 Wheat. (U. S.) 1 (6 L. Ed. 23, see, also, Rose's U. S. Notes), when, in defining the term as employed in our federal constitution, he said: 'Commerce undoubtedly is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches and is regulated by prescribing rules for carrying on that intercourse.' This enlarged meaning of the term 'commerce' has been adopted and carried down through a long line of later decisions of both federal and state tribunals and has been applied to many and varied occupations. In the case of Welton v. Missouri, 91 U. S. 28 (23 L. Ed. 347, see, also, Rose's U. S. Notes), the supreme court said: 'Commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale and exchange of commodities between the citizens of our country and the citizens or subjects of foreign

countries and between the citizens of different states.' In the case of Preston v. Finley, 72 Fed. 850, it was held that within the comprehensive definition of the term 'commerce' given by the supreme court in the foregoing cases, *a newspaper was the subject of commercial intercourse and sale between state and state* like any other article in which the right of traffic exists. In the case of *In re* Radke Co., 193 Fed. 735, it was decided that the term *'commercial corporation'* as used in the National Bankruptcy Act included a corporation which, owning its own property, was engaged in leasing it and collecting rents therefor. *'It was transacting business,'* says the court. In the quite recent case of Asakura v. City of Seattle, 265 U. S. 332 (68 L. Ed. 1041, 44 Sup. Ct. Rep. 515), it was decided that a Japanese alien engaged in the business of *a pawnbroker was engaged in 'trade' within the language of article I of the treaty under review.* In so deciding Mr. Justice Butler said: 'Treaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred. Hauenstein v. Lynham, 100 U. S. 483, 487 (25 L. Ed. 628); De Geofroy v. Riggs, 133 U. S. 271 (33 L. Ed. 642, 10 Sup. Ct. Rep. 295); Tucker v. Alexandroff, 183 U. S. 424, 437 (46 L. Ed. 264, 22 Sup. Ct. Rep. 195; see, also, Rose's U. S. Notes). The ordinance defines 'pawnbroker' to mean and include every person whose business or occupation it is to take and receive by way of pledge, pawn or exchange, goods, wares or merchandise, or any kind of personal property whatever, for the repayment or security of any money loaned thereon, or to loan money on deposit of personal property,' and defines 'pawnshop' to mean and include every place at which the business of pawnbroker is carried on.' *The language of the treaty is*

comprehensive. The *phrase 'to carry on trade' is broad. That it is not to be given a restricted meaning is plain.* The clauses 'to * * * own or lease * * * shops, * * * to lease land * * * for * * * commercial purposes, and generally to do anything incident to or necessary for trade' and 'shall receive * * * the most constant protection and security of their * * * property, * * *' *all go to show the intention of the parties that the citizens or subjects of either shall have liberty in the territory of the other to engage in all kinds and classes of business that are or reasonably may be embraced within the meaning of the word 'trade' as used in the treaty.* (4) In the light of the foregoing views as to the enlarged and liberal interpretation to be given to the words 'trade,' 'commerce' and 'commercial' as employed in the terms of the treaty under consideration, we approach the immediate question as to whether the expressed purpose for which the lease in question here was entered into and the leasehold interest in the lands and premises described therein acquired by the respondent Tagami was such a 'commercial' purpose as to come fairly within the intendment of the treaty makers in the use of said terms. The expressed purpose for which said respondent took said lease and admittedly proceeded to operate thereunder was that of conducting a 'health resort and sanitarium.' It is a matter of common knowledge that health resorts and sanitariums have been and are being established and operated in various parts of the state of California, wherever climatic and other conditions are or are supposed to be favorable, and that these establishments are usually, if not universally, conducted for profit. It is also a matter of common knowledge that the conduct of such institutions involve business transactions, including the equipment and supplying of the institution with the varied and

often extensive accessories to its successful operation and the continuing purchase of merchandise and other articles of daily consumption essential to its upkeep. That the establishment and proper conduct of such institutions as aids to public health should be encouraged is beyond question; *and that persons of alien extraction, even though ineligible to citizenship under our laws, should be permitted to establish and maintain them in the interest of the health, cleanliness and comfort even of their own alien race should be equally beyond controversy. No nice distinction can or should be drawn between a business venture of this character and the many others in which aliens of this particular race, as a matter of common knowledge, are and for many past years have been engaged in the state of California, such as the keeping of hotels, lodging-houses, tea-houses, and eating places of various sorts, the conduct of drug-stores, bath-houses, barber shops, book-stores, theaters, and other places of amusement or recreation. Most, if not all, of these activities are in more or less modified form either necessary or incidental to the conduct of health resorts. To distinguish between a health resort and sanitarium conducted for profit and any or all of these forms of business or commercial activity would be to create a rule of exclusion which would be practically without limit and to shut aliens of this race out of most, if not all, of the many and varied occupations in which they have heretofore preferred or been permitted to engage, and would not only have this effect but would by necessary reaction and sequence foreclose the citizens of our own country from engaging in like pursuits within the Empire of Japan.*

"The appellant herein, in support of the interpretation it would have us place upon the foregoing clause of this treaty, makes the further contention that in interpreting the treaty in the form in which it has

been phrased since its execution in 1911, we should consider those matters of public and official history which preceded and attended the adoption of the treaty in its present form as disclosing an intention on the part of the framers of the treaty to impart to it a restricted meaning which would exclude the sort of occupation or business for which the leasehold here in question was to be utilized. Our attention is directed to the fact that the circuit court of the United States, in the case of Terrace v. Thompson, 263 U. S. 197 (68 L. Ed. 255, 44 Sup. Ct. Rep. 15), recites that in the draft of the treaty presented by the imperial government of Japan, the article therein corresponding to article I of the present treaty contained a clause permitting the citizens or subjects of each of the contracting powers 'to lease land for residential, commercial, industrial, manufacturing and other lawful purposes,' and that in the ensuing correspondence between the then Secretary of State and the representative of the imperial government objection was made to the use of the phrases 'industrial and other lawful purposes' and that as a consequence these phrases were eliminated from the final and adopted draft of said treaty, and it was executed and approved in its present form. The appellant herein deduces from this recital by said court of the foregoing undoubted facts attending the formation and final adoption of the treaty, the conclusion that the more restricted meaning for which it is contending should be given to the words which were permitted to remain therein. But we do not find such a conclusion deducible either from the correspondence between the representatives of the respective powers proposing to enter into treaty relations, nor from the language of said circuit court in reciting and interpreting the same, since it clearly appears from such correspondence, as pointed out in said case, that the sole object in view on the part of

the representative of our government in suggesting the omission of the objectionable phrases was that of eliminating from the draft of said treaty a phrasing which might be held to go beyond the desire of our nation to prevent the leasing to said aliens of agricultural lands, and that this was due to the then existing condition of the California statute inhibiting the leasing of lands for agricultural purposes for a term in excess of three years. It would not be going beyond the boundaries of well-known public history to recall the fact that there was at that very time a growing agitation in California looking toward the adoption of the statute which was in fact enacted in 1913 and to its later enlargement by the terms of which the leasing of lands to alien Japanese for agricultural purposes was altogether inhibited. *If it had been the intention of the framers of said treaty to create a more drastic inhibition against the leasing of lands by aliens of this race than that which is referred to in their correspondence and embraced within the terms of said treaty, it would have been a simple matter to have done so. If, as the appellant insists, the proper interpretation of the express terms of said treaty would render it susceptible of the restrictive meaning which it would have us assign to it, there would have been no impediment in the way of a more drastice statute than that which has been enacted in our alien land law. That such was not the intention of either the treaty makers or the framers of our alien land legislation seems to us clear.*" (Italics ours.)

It will thus be seen that the Supreme Court of California has held by its decision in the Tagami case, that in construing the words "commercial purpose" and "generally to do anything incident to or necessary for trade" a liberal

construction should be given, and that aliens ineligible to citizenship should be permitted to maintain sanitariums and health resorts the same as citizens are doing, and that the operation of a health resort and sanitarium, and the operation of hotels, lodging-houses, tea-houses, eating houses, drug-stores, bath-houses, barber shops, book-stores, theaters and places of amusement or recreation are commercial purposes, and that to distinguish between a health resort and sanitarium and other commercial activities would be to create a rule of exclusion which would be practically without limit and shut aliens of the Japanese race out of most, if not all, the many and varied occupations, which they have heretofore been permitted to engage in. The court further said that if it had been the intention of the framers of the treaty to create a more drastic inhibition it would have been a simple matter to have done so. The Supreme Court of California affirmed the decision of the trial court in the Tagami case in sustaining the demurrer to the complaint.

In the case of Asakura v. City of Seattle, 265 U. S. 332 (68 L. Ed. 141), 44 Sup. Ct. Rep. 515, the United States Supreme Court construed *liberally* Article I of the treaty.

Plaintiffs in error have spent considerable time and attention in pointing out decisions of this and other courts, defining the word "commerce," endeavoring to show that it should be used in a restricted sense, but the foregoing decisions seem to have passed squarely on the same treaty in question and defined the words "commercial purposes," "commerce," and "generally to do anything incident to or necessary for trade," as used in the treaty.

Plaintiffs in error have also spent considerable time and attention in pointing out that *commerce or commercial*

should be construed as buying or selling physical things and not in its broad sense, claiming that the hotel business is an industry, that transportation is an industry, that the banking business is an industry, that the theater business is an industry, that the laundry business is an industry, that the advertising business is an industry. However, in State v. Tagami, *supra*, the court has actually decided that the word *commercial* should be used in its broadest sense to include hotels, restaurants and many of such lines of business. No appeal was ever taken from the opinion in the Tagami case to this court, and it therefore stands as law in the state of California. By adopting the contentions of plaintiffs in error, this court would necessarily have to reverse the decision in the Tagami case.

The Supreme Court of California in the decision appealed from, viz., Tashiro v. Jordan, 73 Cal. Dec. 635, refers with approval to its decision as to treaty construction in the case of State of California v. Tagami.

Before proceeding further, it might be well to consider the canons of treaty construction.

THE CANONS OF TREATY CONSTRUCTION.

(a)

Treaties Are Construed Like Contracts.

"* * * Treaties are the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning and to choose apt words in which to embody the purposes of the high contracting parties."

Rocca v. Thompson, 223 U. S. 317, 332.

"Undoubtedly, said the court, the intention of the two governments, as gathered from the words of the

treaty, must control; and the entire instrument must be examined in order that the real intention of the contracting parties may be ascertained."

Treaties, Their Making and Enforcement, Crandall, p. 376.

"Various rules have, however, been laid down expressly with reference to the construction of treaties. * * * The treaty should also * * * be given such a construction as tends to the common advantage of the contracting parties and tends to place them upon an equality. * * *"

"Treaties should ordinarily be construed liberally, and so where the treaty admits of two constructions, one restrictive as to the rights that may be claimed under it and the other liberal, the latter is to be preferred."

38 Cyc., p. 970.

R. C. L. 26, p. 926:

"* * * A treaty is to be construed on principles similar to those applied to other contracts and statutes. * * *"

Moore, International Law Digest, Vol. 5 (p. 249):

"Treaties should be interpreted 'in a spirit of *uberrima fides*,' and in a manner to carry out their manifest purpose."

"A treaty is not only a law, but also a contract between two nations, and, under familiar rules, it must, if possible, be so construed as to give full force and effect to all its parts."

"There is no rule of construction better settled either in relation to covenants between individuals or treaties between nations than that the whole instrument containing the stipulation is to be taken together,

and that all articles in *pari materia* should be considered as parts of the same stipulations."

Page 251, *supra*:

"In doubtful cases that construction is to be adopted which will work the least injustice—which will put the contract on the foundation of justice and equity rather than of inequality."

"It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended. And it has been held by this court that where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred. Hauenstein v. Lynham, 100 U. S. 483, 487."

"In the construction of treaties, the general doctrine is that any special advantage conceded by a party under any one article is in consideration of all the advantages enjoyed by the same party under that and all other articles of the treaty."

Page 252, *supra*:

"'(3) Construction of treaties is a matter of law, to be governed by the same rules *mutatis mutandis*, as prevail in the construction of contracts and statutes."

"'(6) Construction is to be distinguished from "Interpretation." "Construction" gives the general

sense of a treaty and is applied by rules of logic; "interpretation" gives the meaning of particular terms, to be explained by local circumstances and by the idioms the framers of the treaty had in mind.' "

Cyc., Vol. 38, p. 969:

"• • • But if the treaty is open to construction they should endeavor to ascertain and give effect to the intention of the parties, and in so doing will adopt the same general rules which are applicable in the construction of statutes, contracts, and written instruments generally, and particularly those applicable in the construction of contracts between individuals. • • • Treaties should ordinarily be construed liberally and so where the treaty admits of two constructions, one restrictive as to the rights that may be claimed under it, and the other liberal, the latter is to be preferred. • • •"

(b)

Treaties Are Prepared by Those Skilled in Legal Phraseology and the Words Used Should Be Given Their Customary Meaning in National, Municipal and International Law.

"It is generally stated that the words of a treaty are to be taken as used with their plain and natural meaning. • • • This rule is subject to the qualification that words with a customary meaning in international usage or in the public law of each of the contracting parties are to be understood as used in this customary or technical sense, unless a contrary intention clearly appears from the context. Treaties are viewed as having been prepared with care and deliberation by those versed in international law and familiar with the legal signification of words. • • • If terms used in a treaty have definite but different legal meanings

in the contracting states, and there is no common and generally received meaning in the public law of nations, that meaning which obtains within the state to which the provision specifically applies at the time of the conclusion of the treaty is, it seems, to prevail."

Crandall—Treaties, Their Making and Enforcement, pp. 396-397.

"* * * But if the words of a treaty have a common and accepted meaning in international usage, they are to be taken as used with this meaning, and not in any artificial or special sense impressed by local law, unless it clearly appears that this special and restricted meaning was intended by the parties * * *."

Crandall—Treaties, Their Making and Enforcement, p. 398.

Page 400, *supra*:

"In general, words should be given the meaning which will tend to give efficacy to the treaty and to secure equality and reciprocity in the benefits to be received by the parties."

(c)

Treaties Should Be Construed in Good Faith to Carry Out the Intention of the Parties.

Treaties, Their Making and Enforcement, Crandall, pp. 401, 402:

"* * * So far as a treaty comes before a domestic court of one of the contracting parties as a municipal law, it should be construed with the utmost good faith and with a view to carry out the apparent intention of the parties. It is primarily a compact between the two nations. 'This court would not readily lean to favor a restricted construction of lan-

guage, as applied to the provisions of a treaty, which always combines the characteristics of a contract, as well as a law.' 'Where a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it, and the other liberal, the latter is preferred. Shanks v. Dupont, 3 Pet. 242. Such is the settled rule in this court.' No words, clause, or provision is presumably redundant; and effect is, if possible, to be given to each of them. 'Treaties are formed upon deliberate reflection. Diplomatic men read the public treaties made by other nations and cannot be supposed either to omit or insert an article, common in public treaties, without being aware of the effect of such omission or insertion."

Page 418, *supra*:

"• • • The right to reside in the country with the same privileges as the subject of Great Britain or France, implies the right to follow any lawful calling or pursuit which is open to the subject of these powers. Therefore, the provisions in the mining regulations of Poorman Creek, which, in effect, forbid Chinamen from working in a mining claim for themselves or others, as well as the clause of the State Constitution to the same effect, seem to be in direct conflict with this article of the treaty; and if so, are therefore void.' • • •."

Moore, International Law Digest, Vol. V, p. 249:

"Treaties should be interpreted 'in a spirit of *uberrima fides*,' and in a manner to carry out their manifest purpose."

(d)

A Liberal Construction Rather Than One Restrictive of Rights Should Be Favored.

38 Cyc., p. 970:

"Various rules have, however, been laid down expressly with reference to the construction of treaties. * * * The treaty should also be given such a construction as tends to the common advantage of the contracting parties and tends to place them upon an equality. * * * Treaties should ordinarily be construed liberally, and so where the treaty admits of two constructions, one restrictive as to the rights that may be claimed under it and the other liberal, the latter is to be preferred."

Hauenstein v. Lynham, 100 U. S. 483 (Oct., 1879):

"* * * Where a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it, and the other liberal, the latter is to be preferred. Shanks v. Dupont, 3 Pet. 242. Such is the settled rule in this court * * *."

Hyde, International Law (Sec. 535):

"That the courts of a contracting state, such as those of the United States, act on the assumption that it was the design of the contracting parties not to contravene principles of morality and fairness, and not to provide the means for perpetrating or protecting frauds, that their agreement should be interpreted in a spirit of the utmost good faith, and in a manner to carry out its manifest purpose, and that its terms should be liberally construed, manifests simply an imputation of good faith, and high purpose to the executive branch of the government and to that of other contracting powers. It is recognition of the

only intelligible theory in which enlightened states could be deemed to conclude treaties with each other.

"The court may wisely hesitate to indulge in the presumption that the terms of a treaty were given a significance such as to entail a peculiar sacrifice by one party, and involving undertakings beyond the requirements of international law. Such reluctance indicates, however, nothing more than a demand for convincing proof that those terms were used in such a sense. It does not imply any denial of the right of the parties to so agree; nor does it concern the nature of the evidence which may be competent to establish the fact. Such a judicial attitude may be regarded as more salutary than one evincing readiness to presume that the contracting parties did not attach to the terms of the treaty a significance which they might not unreasonably have adopted."

(c)

Each Provision of a Treaty Should Be Construed Pari Materia With All the Others.

Moore, International Law Digest, Vol. 5, page 249:

"There is no rule of construction better settled, either in relation to covenants between individuals or treaties between nations, than that the whole instrument containing the stipulations is to be taken together, and that all articles in *pari materia* should be considered as parts of the same stipulation."

"• • • No priority is attached to the numerical order of the provisions in the same treaty. Each provision is supposed to be drawn with due regard to all of the provisions *pari materia* in the same instrument. • • • ."

(f)

A Construction Should Be Adopted Which Places the Parties to a Treaty on an Equality.

Crandall—Treaties, Their Making and Enforcement, page 400:

> "In general, words should be given the meaning which will tend to give efficacy to the treaty and to secure equality and reciprocity in the benefits to be received by the parties."

Moore's International Law Digest, Vol. 5, page 251:

> "In doubtful cases that construction is to be adopted which will work the least injustice—which will put the contract on the foundation of justice and equity rather than of inequality. * * *
>
> "It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties, to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended. And it has been held by this court that where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred. Hauenstein v. Lynham, 111 U. S. 483, 487."

The Name of the Japanese—United States Treaty of 1911.

As we are considering the question of the canons of construction applicable to treaties, it is interesting to in-

quire how far we shall be aided in the proper construction of the treaty before us, by examining its title and preamble. It might be thought that the title and preamble of the treaty was an attempt in a few words properly to characterize it, and that therefore the words "Commerce and Navigation" describe fully the aims, objects and scope of the treaty. It must be conceded by all those who have studied the numerous treaties between the United States and foreign countries, that there is scarcely a question involving the rights of persons and property which has not been made the subject matter of some treaty. If we could do so within the scope of this brief, it would be interesting to catalogue the different personal and property rights which have been necessarily adjudicated by the courts of this country, in cases involving construction of treaties. We can do no more, however, in passing than to call the court's attention to the very significant fact that the two words, "Commerce" and "Navigation," used often singly and often in conjunctions, are well established and traditional words adopted by common international usage in the names of treaties. We submit a list of such treaties, with no attempt to make the list complete, but with the suggestion that in view of the wide scope of the treaties named, we can hardly conceive of English words of greater longitude and latitude than the words "Commerce" and "Navigation."

A List of Treaties by Name.

1. Treaty of Friendship, Commerce and Navigation (Argentine).

2. Treaty of Peace, Amity and Commerce (Chile).

3. Treaty of Peace, Amity and Commerce (China).

4. Treaty of Peace, Amity and Commerce (Columbia).

5. Commercial Convention (Cuba).

6. Treaty of Friendship, Commerce and Navigation (Denmark).

7. Treaty of Amity and Commerce (Dominican Rep.).

8. Treaties of Amity and Commerce and Alliance (France).

9. Treaty of Commerce and Navigation (Hanover).

10. Treaty of Friendship, Commerce and Navigation (Hanseatic Republics).

11. Treaty of Amity and Commerce (Prussia).

12. Treaty of Amity, Commerce and Navigation (Great Britain).

13. Treaty of Commerce and Navigation (Greece).

14. Treaty of Commerce and Navigation (Italy).

15. Treaty of Amity, Commerce and Navigation (Mexico).

16. Treaty of Peace and Commerce (Netherlands).

17. Treaty of Commerce and Navigation (Ottoman Empire).

18. Treaty of Commerce and Navigation (Paraguay).

19. Treaty of Friendship and Commerce (Peru).

20. Treaty of Commerce and Navigation (Portugal).

21. Treaty of Commerce and Navigation (Russia).

22. Treaty of Friendship, Boundaries, Commerce and Navigation (Spain).

23. Treaty of Amity and Commerce (Sweden and Norway).

24. Treaty of Friendship, Commerce, Extradition (Switzerland).

How Have Treaties Been Construed in Decided Cases by the Courts of This Country?

It is our contention that an examination of decided cases shows that, in actual practice, treaties have always been construed in a broad and liberal way, with the utmost good faith, and with a view to extending protection to both the personal and property rights of the nationals of all countries with whom he have treaties. An exhaustive study of many treaty cases has not resulted in our finding a single case where any words in a treaty have been given a narrow or restricted or technical meaning, and particularly do we believe that no case can be found where either the words "commerce" or "commercial purpose" are construed in a treaty as words of limited, narrow, or technical meaning. Per contra, we shall cite many cases were English words in treaties are stretched to the utmost limit in order that the broad purpose of a treaty may be preserved. It is our contention that our courts, both federal and state, have preserved the standard of *uberrima fides* in treaty construction to the end that our American ideal of public morality in international affairs may be maintained, despite the claims of those who would lower it to the level of an assumed political expediency. We wish now to give this court—

A Few Examples of Liberal Construction of Treaties in Actual Cases:

Geoffrey *et al.* v. Riggs *et al.* (February 3, 1890), 10 Sup. Ct. 295.

In this case the words "States of the Union" in the Treaty of 1853 between the United States and France

was construed as broad enough to include the District of Columbia, the court saying:

> "It is a general principle of construction, with respect to treaties, that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction, words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended. * * *"

In the recent case of Banforth v. Ihmsen, 204 Pac. 354 (February 10, 1922), the Supreme Court of Wyoming, in construing the treaty between the United States and Great Britain, held that the word "territories," as used in the treaty, was broad enough to include states, the court saying:

> "* * * It is contended that the term 'Territories,' above mentioned, must be construed as applying only to one of the territories of the United States, as distinguished from a state. The rule laid down by the Supreme Court of the United States is that:
>
> "'Where a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it, and the other liberal, the latter is to be preferred.' Hauenstein v. Lynham, 100 U. S. 483, 25 L. Ed. 628.
>
> "We accordingly think that the term 'territories,' as used in the above treaty, is to be construed in its broader sense as meaning and including any area or locality under the dominion of the United States. While we have no authority direct on that point, yet it has always, so far as we have found, been given

that meaning by the courts in discussing the above treaty or one similar to it. Schultze v. Schultze, 144 Ill. 290, 33 N. E. 201, 19 L. R. A. 90, 36 Am. St. Rep. 432; Ahrens v. Ahrens, 144 Iowa 486, 123 N. W. 164, Ann. Cas. 1912A, 1098; Pierson v. Lawler, 100 Neb. 783, 161 N. W. 419. This treaty will control and suspend the rule of the common law in force in this state during such time as the rights conferred thereby are in force or extended by the courts pursuant thereto. 2 C. J. 1065. * * *"

In the case of *In re* Ross, 11 Sup. Ct. Rep. 897, Mr. Justice Field construed the word "Americans," appearing in the treaty with Japan of June 17, 1857, as broad enough to include an English subject who was an enlisted seaman on board an American vessel, flying the American flag, the learned judge saying:

"* * * It is a canon of interpretation to so construe a law or a treaty as to give effect to the object designed, and for that purpose all of its provisions must be examined in the light of attendant and surrounding circumstances. To some terms and expressions a literal meaning will be given, and to others a larger and more extended one. * * * The inquiry in all such cases is as to what was intended in the law by the Legislature, and in the treaty by the contracting parties. * * * And in the present case, to carry out the intention of the treaty and statute in question, they will be construed to apply to all parties who are by public law, or the law of the country, entitled to be treated for the time, from their employment and service, as citizens."

In construing article 10 of the treaty with Great Britain of August 9th, 1842, in the case of United States v. Rauscher, 119 U. S. 407, the court said in substance that

the treaty must be construed in respect of its "manifest scope and object."

In construing the treaty between the United States and Mexico with respect to the boundaries of the state of Texas, the Supreme Court said:

> "* * * Undoubtedly the intention of the two governments, as gathered from the words of the treaty, must control; and the entire instrument must be examined in order that the real intention of the contracting parties may be ascertained * * *"

The Supreme Court of the United States held in the old case of Delamus v. United States, 6 Peters U. S. 117, that inviolability and security of persons and property are included in the words "rights, advantages and immunities of citizens of the United States," as used in a treaty.

In the case of University v. Miller, 14 N. C. 188, the word "effects," as used in the treaty, was construed to include land, on the principle of broad construction. See, also:

Adams v. Ackerland, 168 Ill. 632, 48 N. E. 454.

In the case of Hamilton v. Erie R. R. Co. (November 28, 1916), 219 N. Y. 343, in defining the rights of consuls and consular agents, the court said that it was a part of their duties "to conserve the property within their territorial jurisdiction, of their countrymen dying therein." "And to protect the commercial interests of these citizens or subjects in the country in which they are accredited."

Mr. Chief Justice Fuller, acting as a member of the tribunal of arbitration at The Hague Convention, and construing an agreement between Great Britain and France, said:

"In default of a definition of the term 'protege' in the General Act of the Brussels Conference (of July 2, 1890), this term must be understood in the sense which corresponds best as well to the elevated aims of the conference and its final act, as to the principles of the law of nations, as they have been expressed in treaties existing at that time, in internationally recognized legislation and in international practice."

In the case of *In re* Adutt (1893), 55 Fed. 376, the court, in construing the treaty between the United States and Austria-Hungary, held that the word "forgery" as used in the treaty should have its common law definition, which includes forgery of commercial paper as well as the falsification of public obligations. The court referred, on page 368 of the opinion, to "the spirit of that treaty."

In construing the treaty with France, it is held that "the term 'property,' as applied to lands, comprehends every species of title, inchoate or complete, legal or equitable, and embraces those rights which lie in contract, executory as well as executed." (Crandall—Treaties, Their Making and Enforcement, p. 492.)

And also that "in the term laws is included custom and usage, when once settled." (Crandall, *supra.*)

The word "representatives" in the treaty with the Hanseatic Republic has been construed by the Supreme Court of Illinois in Schultz v. Schultz, 144 Ill. 290, broadly as including all who take by will or descent, heirs and devisees, as well as executors and administrators.

The Supreme Court of the United States has said that corporations, as well as individuals, are within the purpose and purview of the treaty with Great Britain. Gospel etc. v. Wheeler *et al.* (1814), 2 Gall. 105, 135.

A splendid example of liberal interpretation of treaties is found in the case of Jackson v. Lund, 3 John. Cases, 109, where the court says:

> "These words ought to have a very liberal interpretation, in advancement of their beneficial end. They ought to apply, in furtherance of the amicable intention of the two nations, to every British subject who, at the time of the treaty, was in the enjoyment of lands within the United States, and whose title thereto would be valid, independent of the plea of alienism. In all such cases the treaty may be considered as doing away the plea."

In the case of *Ex parte* Charlton (1911), 185 Fed. 880, the word "persons" in the treaty with Italy was considered as a matter of interpretation sufficiently broad to embrace citizens and subjects of the contracting parties.

In construing a treaty with Spain, the court in the old case of Pizzaro (1817), 2 Wheat. 227, construed the word "subjects" very broadly as used in the treaty, as applying to all persons domiciled in the Spanish Dominion, in the same sense as the term citizens or inhabitants was used when applicable to persons owing allegiance to the United States.

In the old case of Chirac v. Chirac (1817), 2 Wheat. 259, the court in construing the treaty with France of February 6th, 1778, as giving to a French citizen the right to purchase and hold lands in the United States, said:

> "Upon every principle and fair construction, this article gave to the subjects of France a right to purchase and hold lands in the United States."

In the recent case of U. S. & Cuban Allied Works Engineering Corporation v. Lloyds (March 20, 1923), 291 F. 889, the court says:

"Article 1 of the Treaty of 1815 with Great Britain (8 Stat. 228; Malloy, Vol. 1, p. 624), as extended indefinitely by that of 1827 (8 Stat. 260; Malloy, Vol. 1, p. 645), provides that between the two powers there shall be 'a reciprocal liberty of commerce'; that the inhabitants of either 'shall have liberty freely and securely to come with their ships and cargoes to all such places * * * to which other foreigners are permitted to come, to enter into the same, and to remain and reside in any parts of the said territories, * * * and, generally, the merchants and traders of each nation, respectively, shall enjoy the most complete protection and security for their commerce, but subject always to the laws and statutes of the two countries.' The last words do not, of course, include 'laws and statutes' subjecting them to discrimination by reason of their alienage, and the treaty necessarily overrides any state statute to the contrary. Geofroy v. Riggs, 133 U. S. 258, 10 Sup. Ct. 295, 33 L. Ed. 642; Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; Truax v. Raich, 239 U. S. 33, 36 Sup. Ct. 7, 60 L. Ed. 131, L. R. A. 1916D, 545, Ann. Cas. 1917B, 283. These aliens could neither be excluded from entry into the state of New York, nor from transacting business with her citizens."

In the very recent California case of Estate of Romaris (Sept. 7, 1923), 66 C. D. 259, not only is the doctrine firmly and positively re-stated that a treaty is the paramount law of the land, a statute of California to the contrary notwithstanding, but the treaty is designated as a "consular convention," and yet under the canon of broad and liberal construction, the words "right of possessing personal and real property, etc.", give to a Frenchman the same rights of ownership as citizens have.

The court there answered the plea of the attorney general for a narrow and limited construction of the French treaty of 1853:

> "(1) Appellant argues that the state law and the treaty provision do not conflict for the following reasons: (a) Because the treaty does not grant equality in the matter of inheritance. The argument in support of this is that the treaty provides for equality only with respect to the right of possessing property, and that one possesses property by holding it, but only after it has come to him by inheritance, purchase, gift or otherwise, and that the treaty therefore does not apply to the situation here obtaining. This precise question was decided adversely to appellant's contention in Geofroy v. Riggs, 133 U. S. 258, and Bahuaud v. Bize, 105 Fed. 485."

The word "commerce" as it appears in the Constitution of the United States has been repeatedly construed by our courts as a word of the largest possible import.

We must remember that we are called upon to construe an English word of our own choosing, and one which had received judicial construction by our courts before it was used in the United States-Japanese treaty. In article I, section 8 of our Constitution, amongst the grant of powers to Congress appears that famous specification of powers "To regulate commerce with foreign nations, and among the several states, and with the Indian tribes." In view of the long line of decisions in which the word "commerce" has been developed by judicial definition to include almost every form of industrial activity with the rights, duties, obligations, accessories and incidents thereof, how can we now ask this court to adopt a narrow and shallow definition of the adjective of the same noun

when used in a treaty? The Japanese who negotiated and signed the treaty may well have believed that the expression "commercial purposes" was at least as broad in its scope as the noun "commerce." It may be presumed that they, as well as our President and Senate, were acquainted with the way our courts had construed the word commerce. We can conceive of no greater breach of international good faith than for these United States, or any state, to attempt now to confine the expression "commercial purpose" within the narrow limits of "barter" or "an exchange of goods" or "buying and selling of personal property," or "the exchange between men of the products of nature or art."

> "From this it follows that a literal and narrow meaning of a clause may not be made to defeat the manifest purpose of the parties as gathered from the entire instrument. 'We are not at liberty to ascribe a meaning to the terms of a treaty which would frustrate the known and proved purpose of the instrument, unless the words used in the instrument are such as to permit of no other construction. Whoever asserts a construction which would produce such a result must show not merely that it is a possible construction, but that it is a necessary construction, and that any other is impossible."
>
> "• • • 'The whole document will be taken together, and will be considered in connection with the attendant circumstances, the situation of the parties, and the object in view, and thus the literal meaning of an isolated clause is often shown not to be the meaning really understood or intended.' • • •
>
> "• • • Many cases are cited in the early books of the avoidance of the plain purpose of the treaty

by the adoption of a restricted literal meaning of the terms."

Crandall—Treaties, Their Making and Enforcement, pp. 371, 372.

The great Chief Justice Marshall said in the case of Gibbons v. Ogden (1824), 9 Wheaton 1:

"Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter."

Preston v. Finley, 72 Fed. (1896), 850 (quoting from page 859 of the opinion):

"'Commerce,' says the Supreme Court, 'is a term of the largest import. It comprehends intercourse for the purposes of trade, in any and all its forms, including the transportation, purchase, sale and exchange of commodities between the citizens of our country and the citizens or subjects of foreign countries, and between the citizens of different states.' Welton v. Missouri, 91 U. S. 280. In County of Mobile v. Kimball, it is said by the Supreme Court that 'commerce with foreign countries and among the states strictly considered, consists in intercourse and traffic, including in those terms navigation, and the transportation and transit of persons and property, as well as the purchase, sale and exchange of com-

modities.' 102 U. S. 702; McCall v. California, 136 U. S. 108, 10 Sup. Ct. 881. 'Commerce, undoubtedly, is traffic,' said Chief Justice Marshall, 'but it is something more. It is intercourse. It describes the commercial intercourse between nations and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.' Gibbons v. Ogden, 9 Wheat. 1. Within the comprehensive definition given the term 'commerce' by the Supreme Court, a newspaper is a subject of commercial intercourse and sale between state and state, like any other article in which a right of traffic exists. • • •"

In re R. L. Ralke Co., 193 Fed. (1900) 735.

A moneyed, business or commercial corporation is defined in this opinion, as follows:

"We cannot do otherwise than follow the definition of the terms 'moneyed,' 'business' and 'commercial' which were adopted and approved by the federal courts when called upon to interpret the earlier statute.

"In Rankin v. Florida, A. & G. C. R. Co., 20 Fed. Cas. No. 11,567, in deciding that a railroad company is a 'business corporation' within the meaning of that term as used in the Bankruptcy Act, the court declared that a corporation created for the purpose of carrying on any lawful business defined by its charter and clothed with power so to do, for the sake of gain, is a 'business corporation,' and amenable to the provisions of the Bankruptcy Act."

"• • • The attempt to limit the word 'business' so as to be merely synonymous with trading would deprive it of its meaning beyond that included in the other words, 'money' and 'commercial.' • • •"

5 Cal. Jur. Commerce, Sec. 3, p. 239:

> "3. Definitions of Terms.—The word 'commerce' is a term of the largest import. It is not limited to an exchange of commodities only, but includes and is coextensive in its meaning with 'intercourse.' The term includes, says a high authority, 'the fact of intercourse and of traffic and the subject matter of intercourse and traffic. The fact of intercourse and traffic again embraces all the means, instruments and places by and in which intercourse and traffic are carried on, and, further still, comprehends the act of carrying them on at these places and by and with these means. The subject matter of intercourse or traffic may be either things, goods, chattels, merchandise or persons.' * * *"

The Legal Definition of the Words, "Commerce", "Commercial", and "Trade", Shows That They Are Words of Wide and Comprehensive Meaning.

The suggestion that the words connote by their definition transactions carried on for the purposes of gain and profit, is found in the very old case of Fleckner v. U. S. Bank (1823), 8 Wheat. p. 338, in which the question under review was the power of the United States Bank, under its charter, legally to purchase notes in the ordinary course of business, when all its articles declare "the said corporation shall not, directly or indirectly, deal or trade in anything except bills of exchange, etc."

The court held, in deciding the case, that the true interpretation of the words "deal or trade" was that the bank was interdicted "from doing the ordinary business of a trader or merchant in buying and selling goods, etc., for profit, and uses the words 'deal and trade' in contradistinction to purchases made for the accommodation

or use of the bank or resulting from its ordinary banking operations."

As illustrating the scope of the word "commercial," we quote from the old case of Watson v. Tarpley, 18 How. U. S. 517, 521:

> "'The general commercial law being circumscribed within no local limits, nor committed for its administration to any peculiar jurisdiction, and the Constitution and laws of the United States having conferred upon the citizens of the several states, and upon aliens, the power or privilege of litigation and enforcing their rights acquired under and defined by that general commercial law, before the judicial tribunals of the United States, it must follow by regular consequence that any state law or regulation the effect of which would be to impair the rights thus secured, or to divest the federal courts of cognizance thereof * * * must be nugatory and unavailing."

Commercial property is defined as "property leased out for revenue."

12 C. J. 142;
Female Orphan Society v. Board of Assessors, 109 La. 537, 33 S. 592.

A commercial venture is defined as "Wherever capital is to be laid out on any work and a risk run of profit or loss, it is a commercial venture."

12 C. J. p. 141.

Commercial domicile is defined as "A domicile acquired by maintenance of a commercial establishment in a country, in relation to transactions connected with such establishments."

12 C. J. p. 142.

Commerce is defined as:

"Commerce, in its simplest signification, means an exchange of goods; but in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange, become commodities, and enter into commerce. The subject, the vehicle, the agent, and the various operations become the objects of commercial regulation. Riverside Mills v. Atlantic Coast Line R. Co., 168 Fed. 987, 989, 990 (citing Gibbons v. Ogden, 9 Wheat. (22 U. S.) 230, 6. L. Ed. 78); Northern Securities Co. v. United States, 24 Sup. Ct. 436, 478, 193 U. S. 197, 48 L. Ed. 679."

Words and Phrases, Vol. 1, p. 788.

"The word 'commerce' is not susceptible to exact and comprehensive definition, though a fairly accurate conception of its meaning can be arrived at from the judicial inclusive and exclusive definitions which have been given from time to time. It has been said that the word is a term of the largest import—of very large significance."

5 R. C. L. p. 690.

"The word 'commerce,' as employed by the framers of the Constitution, implies a means to a financial, pecuniary or other like remunerative end, traffic or trade for emolument or compensation. This meaning is basal. We unconsciously imply such meaning whenever we employ the word."

Bl. Com., pp. 273-278, Subd. 5;

1 Kent Com., pp. 32-34, 431-439;

U. S. v. Hoke, 187 Fed. 992;

Kellar v. U. S., 213 U. S. 138, 53 L. Ed. 1066;

Black, Const. Law, 3rd Ed., 391-392.

In concluding our review of cases where the canons of broad and liberal construction of treaties have been

employed, we seem to be justified in our previous premise that we can think of no questions involving the purely civil rights of nationals, both in respect of their persons and property, which have not been included in some of the many treaties now in existence. In this connection, however, a broad distinction must be drawn between civil rights and political rights. We know of no treaty which attempts to guarantee to nationals of any country political rights in any other country, that is, the rights of citizenship, such as voting and other rights of that character. But the so-called rights of person and property are included within the broad language of many treaties, regardless of whether said treaties are designated treaties of commerce, of navigation, of peace, of amity, or howsoever they may be designated.

> "To what extent it is thus limited has been considerably discussed without being definitely defined, no treaty having ever been declared by the courts to be void. It would seem clear, however, that the treaty power does not extend so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the states, and it has also been stated that it would not authorize a cession of any portion of the territory of a state without the consent of that state; but subject to the limitations mentioned it may be said generally to extend to all matters which are proper subjects of negotiation between our government and the governments of other nations, such as matters relating to extradition, property rights and disabilities of aliens, rights, powers and duties of ambassadors and consuls, and the jurisdiction of consular courts, regulation of commercial relations with foreign countries, regulation and protection of trade-marks, submission to arbitration of controversies with other

governments in which public interests are concerned, and the acquisition of territory. The treaty-making power in the United States has been exercised with regard to a large variety of subjects, and at different times pursuant to resolutions of the Senate compilations have been made of all the treaties between the United States and other powers."

38 Cyc., p. 966.

There is little, if any, distinction between a health resort and sanitarium, and a hospital; and a fine distinction, indeed, would have to be drawn to hold that a health resort and sanitarium was a commercial purpose, but that a hospital was not.

What does the term, "to do anything incident to or necessary for trade upon the same terms as native citizens or subjects," mean? The *native citizens* or subjects are permitted without question to incorporate for lawful purposes. Japanese subjects residing in California are authorized, under the treaty, to engage in certain lines of business, including that of leasing real property for commercial purposes, and under the terms of the treaty they are further authorized to do anything incident or necessary to the conduct of such business upon the same terms as native citizens or subjects. Does this not empower them to form a corporation as one of the necessary incidents of transacting such business? As the Supreme Court of California said in its opinion in the case of Tashiro v. Jordan, 73 Cal. 635:

"There is scarcely a class of business of any consequence carried on in this state in which corporate interests do not play, if not a leading, at least an important part in its transaction. The extensive and widespread use of this means of carrying on trade

or transacting business is convincing proof of the advantages to be derived therefrom. Why, then, should this method of carrying on trade as to the classes of business enumerated in the treaty be denied subjects of Japan residing in this state in face of the plain provisions of the treaty conferring upon them, as such classes of business, the right to do anything incident to such business upon the same terms as native citizens? A corporation or the members thereof in conducting any certain business do not thereby exercise any more extensive or different right or control over the property of said business than they would exercise over said property if they carried on the business as individuals. Should the petitioners as individuals decide to lease land and erect thereon a hospital and maintain and operate the same, they could do so in the same manner and to the same extent as a corporation organized by them might do the same identical acts. *As a corporation they would not be authorized to exercise any right over property which they do not now possess as individuals, nor to transact any business, nor engage in any line of trade which they could not transact or engage in as individuals. The corporation is simply the instrumentality through which the members thereof engage to carry on business in which they have a common interest.* (Italics ours.) It is simply incidental to the business just as an agreement of copartnership would be if a partnership were formed to perform the same acts."

Plaintiffs in error urge the very strictest construction of the treaty. For instance, on page 29 of their brief, they say that citizens or subjects of Japan may engage in any lawful business in California which can be conducted without leasing the land, and the hospital business can be so conducted by leasing a building suitable for that pur-

pose. How could a building be leased without leasing the land unless the building was personal property on props and not affixed to the land so as to become a part thereof? Such arguments as this are impracticable and show to what length plaintiffs in error are going in their demand for a narrow and restricted construction of the treaty. Another example is where they admit that individuals as such or as a partnership could, under the treaty and the alien land act, lease land for commercial purposes, but that because these individuals incorporate they cannot do so for the reason that the treaty *does not specifically say in so many words that the individuals may incorporate*, and then lease land for commercial purposes. There is no distinction between the trade of individuals and the trade of a corporation owned by those individuals, and plaintiffs in error are making use of a legal fiction, not recognized by the treaty-makers nor the nations entering into the treaty. The construction that should be placed on the treaty is, that individuals conduct their trade through corporations, and that corporations have no real existence as entities, but are groups of individuals banded together in a particular way for the purpose of transacting their business. A common-sense construction of the treaty was made by the Supreme Court of California in its opinion in this case, and we feel that in construing treaties a broad, liberal and common-sense construction of the treaty involved should be, and has always been, given by the courts. It would be impossible to put in a treaty everything that could be done by the citizens of each of the contracting parties, and this is never attempted in any treaty, and was not attempted in the treaty under discussion. If the treaty undertook to enumerate each

thing that could be done by the citizens of the contracting parties, then the argument of plaintiffs in error, that because nothing was said about forming a corporation in the treaty, it was intended that no corporation should be formed, might be well made; but the treaty involved does not undertake to enumerate what can or cannot be done, the construction thereof being left to the courts, the treaty-makers having in mind, no doubt, that courts have always liberally construed treaties.

Validity of Treaty.

Plaintiffs in error have spent some time and considerable effort in discussing the matter of the several states and the people thereof possessing the right to issue charters to corporations, and the power of the federal government to interfere with the exercise of this right, even by treaty. In other words, it is contended that if under the treaty the citizens of Japan residing in California have a right to form a corporation to carry on trade and lease land for commercial purposes, that the United States had no right to enter into such a treaty which permitted this situation, as it interfered with the exercise of the right of issuing and granting charters by the state of California, and that the United States has never had the right to interfere by treaty, or otherwise, with this right of the state. In other words, the treaty is not valid, as under it the state of California can be forced to issue certificates of incorporation whether or not it wishes to do so.

No one would contend but that citizens of California who have complied with the requirements specified by the Civil Code in connection with the formation of corporations, and who have presented their articles of incorpora-

tion to the Secretary of State for filing, could by mandamus force the Secretary of State to file the articles and issue a charter. If this could be done by citizens, why could it not be done by aliens if the treaty gave them the right to do so? Nevertheless, it is claimed by plaintiffs in error that if the power is given aliens to incorporate under and by virtue of the treaty, then that the treaty is invalid, as it takes from the state of California the right to issue charters to the corporations it desires and to refuse them to others. It seems as if this contention is a rather bold one to assert and contend for, but goes to show that plaintiffs in error are urging every conceivable point to have the decision of the Supreme Court of California reversed. The brief of plaintiffs in error is interesting and thorough, but much of the argument is technical and speculative and not supported with authorities.

Practical Results From Strict Construction Treaty.

It might be well to bear in mind the practical results, both to the nationals of Japan as well as to the nationals of the United States, that would result if the narrow and literal construction of the treaty contended for by plaintiffs in error should be adopted. What is the present situation and condition in both countries under the construction and interpretation now adopted by the nationals themselves, and what would be the effect if a narrow construction was adopted? It must be remembered that the only treaty existing between the United States and Japan is the treaty of 1911, *supra*. Under this treaty Japanese in the United States carry on and conduct business, lease land for residential and commercial purposes, engage in

mercantile enterprises, and have always formed corporations for the purpose of carrying on trade and leasing land for commercial purposes. Under the same treaty Americans in Japan likewise carry on and conduct business, lease land for residential and commercial purposes and engage in all kinds of mercantile enterprises and form corporations to carry on trade. In other words, the treaty is the basis on which Americans are conducting and have conducted and carried on business and commerce in Japan and Japanese have done likewise in the United States. Should a narrow and literal construction of this treaty be adopted, what would be the immediate effect on corporations in Japan which lease land for commercial purposes, such as conducting hospitals, missions, churches, hotels, theaters, restaurants and places of amusement? Vast sums of money are invested in business enterprises carried on and conducted through corporations by Americans in Japan, and the same by Japanese in the United States, not alone in California but in other states of the Union. It must be remembered that this treaty with Japan does not apply, alone, to California, but applies to all of the United States, as well as to all of Japan. The nationals of both the United States and Japan have construed this treaty to permit such corporations as the Japanese Hospital of Los Angeles to be formed. If the construction contended for by plaintiffs in error should be adopted, *it would have the immediate effect of wiping out all of the American corporations in Japan incorporated under the laws of Japan, as well as the Japanese corporations operating under the laws of California.* If this court should adopt the narrow construction as contended for, no doubt the courts of Japan would immedi-

ately adopt the same construction as applying to American citizens in Japan. The result would be disastrous.

The alien land act of California, Statutes 1921, page LXXXIII, in effect December 9, 1920, contains a significant provision in sections 3 and 4. It there refers to corporations organized under the laws of California, of which a majority of the members are aliens or a majority of the issued capital stock is owned by aliens. The framers of this act, no doubt, believed that Japanese ineligible to citizenship could form corporations or the provisions relative to corporations would not have been mentioned in the alien land act. The framers of the alien land act, however, *did recognize that the state of California could not, by any act,* interfere with or limit any rights given under the treaty between the United States and Japan.

The Articles of Incorporation.

We are surprised at plaintiffs in error now for the first time contending that because the wording, "* * * also to own, purchase, sell, mortgage, hypothecate, sell, either as lessor or lessee, real and personal property of every kind or description * * *," appears in the articles of incorporation of the Japanese Hospital of Los Angeles [R. p. 6, fol. 11], that plaintiffs in error properly refused to file same, or issue a certificate of incorporation. A reading of the above shows plainly that the articles *do not provide that the corporation shall own or purchase as owners or purchasers,* but only as *lessor or lessee.* The only question urged in the lower court, and the only question before this court, is whether or not aliens ineligible to citizenship are permitted under the treaty be-

tween the United States and Japan to incorporate for the purpose of operating and maintaining a hospital, and leasing land for the operation of said hospital. It was conceded in the lower court that plaintiffs in error refused to file the articles of incorporation for the reason that Japanese ineligible to citizenship were not permitted under said treaty to form such a corporation. What is desired by all concerned is to have it determined for once and all, whether or not Japanese ineligible to citizenship may incorporate, and for what purposes they may incorporate for years in California, and have formed corporations. Japanese ineligible to citizenship have formed corporations regularly until the refusal of plaintiffs in error in the instant case, to file the articles and issue the certificate. Many business enterprises are being held up awaiting this decision, and it is desired to have a decision squarely on the question involved, and not have a decision based on any technical construction of words in the articles of incorporation. When defendants in error presented the articles of incorporation [R. p. 6] for filing with the plaintiffs in error, and requested the issuance of a certificate of incorporation, no thought was had but that the articles would be filed and the certificate issued, as had always been done. Perhaps if it had been known that plaintiffs in error would refuse to issue said certificate of incorporation, the articles of incorporation might have been a little more artfully drawn, but up until the time of the refusal of plaintiffs in error to file said articles of incorporation, no indication had been given by plaintiffs in error that they would take the action they did, and refuse to file the articles. It is apparent to anyone that the words "* * * also to own, purchase, sell, mortgage,

hypothecate, receive, *either as lessee or lessor*, real and personal property of every kind or description * * *." mean that the corporation shall have power to own, purchase, sell, mortgage, hypothecate, receive, *either as lessee or lessor*, real or personal property of every kind or description. The articles *do not say* to own, or purchase or receive *as owner or purchaser*. A reading of the articles of incorporation will show that the purposes of the corporation were to lease a hospital and *lease land* for the purposes of the hospital, and that was the only matter before the lower court, and is the only matter before this court. We maintain, however, that even if the articles of incorporation provided that the corporation could own as owner or purchaser, real property, still it would not be a justification for plaintiffs in error to refuse to file the articles, because no property was owned or acquired at that time, and if same was later acquired, action could then be taken against the corporation to forfeit such property. We do not think that plaintiffs in error feel that this contention on their part is of any moment, as it is only lightly referred to twice in their brief, and we feel that both parties want the question determined once and for all.

We believe we have answered all the contentions of plaintiffs in error, and while we have not taken up each of the four points argued by plaintiffs in error separately, we feel we have answered all of same, because all of the four points, as heretofore stated, are based upon a construction of the treaty between the United States and Japan, the rights of the defendants in error being measured by this treaty. If a liberal construction of the treaty is given, then the decision of the Supreme Court of California appealed from should be affirmed.

Conclusion.

It is therefore respectfully submitted that defendants in error are entitled to the relief prayed for by them, and that the decision of the court below is correct, and should be affirmed.

Wherefore, defendants in error pray that the judgment of the Supreme Court of the state of California, dated May 20, 1927, and found in 73 Cal. Dec. 635, be affirmed, and for their costs.

Dated March 1, 1928.

J. Marion Wright,
Attorney for Defendants in Error.

APPENDIX A.

Treaty of Commerce and Navigation With Japan.

(February 21, 1911.)

[Signed at Washington, February 21, 1911; ratification advised by the Senate, with amendment, February 24, 1911; ratified by the President March 2, 1911; ratified by Japan March 31, 1911; ratifications exchanged at Tokyo April 4, 1911; proclaimed April 5, 1911.]

The President of the United States of America and His Majesty the Emperor of Japan, being desirous to strengthen the relations of amity and good understanding which happily exist between the two nations, and believing that the fixation in a manner clear and positive of the rules which are hereafter to govern the commercial intercourse between their respective countries will contribute to the realization of this most desirable result, have resolved to conclude a Treaty of Commerce and Navigation for that purpose, and to that end have named their Plenipotentiaries, that is to say:

The President of the United States of America, Philander C. Knox, Secretary of State of the United States; and

His Majesty the Emperor of Japan, Baron Yasuya Uchida, Jusammi, Grand Cordon of the Imperial Order of the Rising Sun, His Majesty's Ambassador Extraordinary and Plenipotentiary to the United States of America;

Who, after having communicated to each other their respective full powers, found to be in good and due form, have agreed upon the following articles:

ARTICLE I.

The citizens or subjects of each of the High Contracting Parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established.

They shall not be compelled, under any pretext whatever, to pay any charges or taxes other or higher than those that are or may be paid by native citizens or subjects.

The citizens or subjects of each of the High Contracting Parties shall receive, in the territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects, on their submitting themselves to the conditions imposed upon the native citizens or subjects.

They shall, however, be exempt in the territories of the other from compulsory military service either on land or sea, in the regular forces, or in the national guard, or in the militia; from all contributions imposed in lieu of personal service, and from all forced loans or military exactions or contributions.

ARTICLE II.

The dwellings, warehouses, manufactories and shops of the citizens or subjects of each of the High Contracting Parties in the territories of the other, and all premises

appertaining thereto used for purposes of residence or commerce, shall be respected. It shall not be allowable to proceed to make a domiciliary visit to, or a search of, any such buildings and premises, or to examine or inspect books, papers or accounts, except under the conditions and with the forms prescribed by the laws, ordinances and regulations for nationals.

ARTICLE III.

Each of the High Contracting Parties may appoint Consuls General, Consuls, Vice Consuls, Deputy Consuls and Consular Agents in all ports, cities and places of the other, except in those where it may not be convenient to recognize such officers. This exception, however, shall not be made in regard to one of the Contracting Parties without being made likewise in regard to all other Powers.

Such Consuls General, Consuls, Vice Consuls, Deputy Consuls and Consular Agents, having received exequaturs or other sufficient authorizations from the Government of the country to which they are appointed, shall, on condition of reciprocity, have the right to exercise the functions and to enjoy the exemptions and immunities which are or may hereafter be granted to the consular officers of the same rank of the most favored nation. The Government issuing exequaturs or other authorizations may in its discretion cancel the same on communicating the reasons for which it thought proper to do so.

ARTICLE IV.

There shall be between the territories of the two High Contracting Parties reciprocal freedom of commerce and navigation. The citizens or subjects of each of the Contracting Parties, equally with the citizens or subjects of

the most favored nation, shall have liberty freely to come with their ships and cargoes to all places, ports and rivers in the territories of the other which are or may be opened to foreign commerce, subject always to the laws of the country to which they thus come.

ARTICLE V.

The import duties on articles, the produce or manufacture of the territories of one of the High Contracting parties, upon importation into the territories of the other, shall henceforth be regulated either by treaty between the two countries or by the internal legislation of each.

Neither Contracting Party shall impose any other or higher duties or charges on the exportation of any article to the territories of the other than are or may be payable on the exportation of the like article to any other foreign country.

Nor shall any prohibition be imposed by either country on the importation or exportation of any article from or to the territories of the other which shall not equally extend to the like article imported from or exported to any other country. The last provision is not, however, applicable to prohibitions or restrictions maintained or imposed as sanitary measures or for purposes of protecting animals and useful plants.

ARTICLE VI.

The citizens or subjects of each of the High Contracting Parties shall enjoy in the territories of the other exemption from all transit duties and a perfect equality of treatment with native citizens or subjects in all that relates to warehousing, bounties, facilities and drawbacks

ARTICLE VII.

Limited-liability and other companies and associations, commercial, industrial, and financial, already or hereafter to be organized in accordance with the laws of either High Contracting Party and domiciled in the territories of such Party, are authorized, in the territories of the other, to exercise their rights and appear in the courts either as plaintiffs or defendants, subject to the laws of such other Party.

The foregoing stipulation has no bearing upon the question whether a company or association organized in one of the two countries will or will not be permitted to transact its business or industry in the other, this permission remaining always subject to the laws and regulations enacted or established in the respective countries or in any part thereof.

ARTICLE VIII.

All articles which are or may be legally imported into the ports of either High Contracting Party from foreign countries in national vessels may likewise be imported into those ports in vessels of the other Contracting Party, without being liable to any other or higher duties or charges of whatever denomination than if such articles were imported in national vessels. Such reciprocal equality of treatment shall take effect without distinction, whether such articles come directly from the place of origin or from any other foreign place.

In the same manner, there shall be perfect equality of treatment in regard to exportation, so that the same export duties shall be paid, and the same bounties and drawbacks allowed, in the territories of each of the Contracting Parties on the exportation of any article which is or may

be legally exported therefrom, whether such exportation shall take place in vessels of the United States or in Japanese vessels, and whatever may be the place of destination, whether a port of the other Party or of any third Power.

ARTICLE IX.

In all that regards the stationing, loading and unloading of vessels in the ports of the territories of the High Contracting Parties, no privileges shall be granted by either Party to national vessels which are not equally, in like cases, granted to the vessels of the other country; the intention of the Contracting Parties being that in these respects the respective vessels shall be treated on the footing of perfect equality.

ARTICLE X.

Merchant vessels navigating under the flag of the United States or that of Japan and carrying the papers required by their national laws to prove their nationality shall in Japan and in the United States be deemed to be vessels of the United States or of Japan, respectively.

ARTICLE XI.

No duties of tonnage, harbor, pilotage, lighthouse, quarantine, or other similar or corresponding duties of whatever denomination, levied in the name or for the profit of Government, public functionaries, private individuals, corporations or establishments of any kind shall be imposed in the ports of the territories of either country upon the vessels of the other, which shall not equally, under the same conditions, be imposed on national vessels in general, or on vessels of the most favored nation. Such equality of treatment shall apply reciprocally to the respective vessels

from whatever place they may arrive and whatever may be their place of destination.

ARTICLE XII.

Vessels charged with performance of regular scheduled postal service of one of the High Contracting Parties, whether belonging to the State or subsidized by it for the purpose, shall enjoy, in the ports of the territories of the other, the same facilities, privileges and immunities as are granted to like vessels of the most favored nation.

ARTICLE XIII.

The coasting trade of the High Contracting Parties is excepted from the provisions of the present Treaty and shall be regulated according to the laws of the United States and Japan, respectively. It is, however, understood that the citizens or subjects of either Contracting Party shall enjoy in this respect most-favored-nation treatment in the territories of the other.

A vessel of one of the Contracting Parties, laden in a foreign country with cargo destined for two or more ports of entry in the territories of the other, may discharge a portion of her cargo at one of the said ports, and, continuing her voyage to the other port or ports of destination, there discharge the remainder of her cargo, subject always to the laws, tariffs and customs regulations of the country of destination and, in like manner and under the same reservation, the vessels of one of the Contracting Parties shall be permitted to load at several ports of the other for the same outward voyages.

ARTICLE XIV.

Except as otherwise expressly provided in this Treaty, the High Contracting Parties agree that, in all that con-

cerns commerce and navigation, any privilege, favor or immunity which either Contracting Party has actually granted, or may hereafter grant, to the citizens or subjects of any other State shall be extended to the citizens or subjects of the other Contracting Party gratuitously, if the concession in favor of that other State shall have been gratuitous, and on the same or equivalent conditions, if the concession shall have been conditional.

ARTICLE XV.

The citizens or subjects of each of the High Contracting Parties shall enjoy in the territories of the other the same protection as native citizens or subjects in regard to patents, trade-marks and designs, upon fulfillment of the formalities prescribed by law.

ARTICLE XVI.

The present Treaty shall, from the date on which it enters into operation, supersede the Treaty of Commerce and Navigation dated the 22nd day of November, 1894; and from the same date the last-named Treaty shall cease to be binding.

ARTICLE XVII.

The present Treaty shall enter into operation on the 17th of July, 1911, and shall remain in force twelve years or until the expiration of six months from the date on which either of the Contracting Parties shall have given notice to the other of its intention to terminate the Treaty.

In case neither of the Contracting Parties shall have given notice to the other six months before the expiration of the said period of twelve years of its intention to terminate the Treaty, it shall continue operative until the ex-

piration of six months from the date on which either Party shall have given such notice.

ARTICLE XVIII.

The present Treaty shall be ratified and the ratifications thereof shall be exchanged at Tokyo as soon as possible and not later than three months from the present date.

In witness whereof, the respective Plenipotentiaries have signed this Treaty in duplicate and have hereunto affixed their seals.

Done at Washington the 21st day of February, in the nineteen hundred and eleventh year of the Christian era, corresponding to the 21st day of the 2nd months of the 44th year of Meiji.

PHILANDER C. KNOX. (Seal)
Y. UCHIDA. (Seal)

And whereas, the advice and consent of the Senate of the United States to the ratification of the said Treaty was given with the understanding "that the treaty shall not be deemed to repeal or affect any of the provisions of the Act of Congress entitled 'An Act to Regulate the Immigration of Aliens into the United States,' approved February 20th, 1927";

And whereas, the said understanding has been accepted by the Government of Japan;

And whereas, the said Treaty, as amended by the Senate of the United States, has been duly ratified on both parts, and the ratifications of the two Governments were exchanged in the City of Tokyo, on the fourth day of April, one thousand nine hundred and eleven;

Now, therefore, be it known that I, WILLIAM HOWARD TAFT, President of the United States of America, have

caused the said Treaty, as amended, and the said understanding to be made public, to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States and the citizens thereof.

In testimony whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this fifth day of April in the year of our Lord one thousand nine hundred and eleven, and of the Independence of the United States of America the one hundred and thirty-fifth.

(Seal) WM. H. TAFT.

By the President:

P. C. KNOX, Secretary of State.

DECLARATION.

In proceeding this day to the signature of the Treaty of Commerce and Navigation between Japan and the United States the undersigned, Japanese Ambassador in Washington, duly authorized by his Government, has the honor to declare that the Imperial Japanese Government are fully prepared to maintain with equal effectiveness the limitation and control which they have for the past three years exercised in regulation of the emigration of laborers to the United States.

Y. UCHIDA.

February 21, 1911.

By the President of the United States of America.

A PROCLAMATION.

Whereas a Protocol of a provisional tariff arrangement between the United States of America and the Empire of

Japan was concluded and signed by their respective Plenipotentiaries at Washington, on the twenty-first day of February, one thousand nine hundred and eleven, the original of which Protocol, being in the English language, is, as amended by the Senate of the United States, word for word as follows:

PROTOCOL.

The Government of the United States of America and the Government of Japan have, through their respective Plenipotentiaries, agreed upon the following stipulation in regard to Article V of the Treaty of Commerce and Navigation between the United States and Japan signed this day to replace on the 17th of July, 1911, the Treaty of the 22nd of November, 1894:

Pending the conclusion of a treaty relating to tariff, the provisions relating to tariff in the Treaty of the 22nd of November, 1894, shall be maintained.

In witness whereof, the respective Plenipotentiaries have signed this Protocol in duplicate and have hereunto affixed their seals.

Done at Washington the 21st day of February, in the nineteen hundred and eleventh year of the Christian era, corresponding to the 21st day of the 2nd month of the 44th year of Meiji.

PHILANDER C. KNOX. (Seal)
Y. UCHIDA. (Seal)

And whereas, the said Protocol, as amended by the Senate of the United States, has been duly ratified on both parts, and the ratifications of the two governments were exchanged in the City of Tokyo, on the fourth day of April, one thousand nine hundred and eleven:

Now, therefore, be it known that I, William Howard Taft, President of the United States of America, have caused the said Protocol to be made public, to the end that the same and every article and clause thereof, as amended, may be observed and fulfilled with good faith by the United States and the citizens thereof.

In testimony whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this fifth day of April in the year of our Lord one thousand nine hundred and eleven, and of the Independence of the United States of America the one hundred and thirty-fifth.

(Seal) Wm. H. Taft.

By the President:

P. C. Knox, Secretary of State.